97 • 307 AUG 19 1997

OFFICE OF THE CLERK

No. 97

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,
VS.
CHARLES T. VON DER AHE and
CHROMA LIGHTING,
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER, EHRMAN, WHITE
& MCAULIFFE
333 Bush Street
San Francisco, California 94104

JAMES A. GAAS
JONATHAN A. STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01901
Attorneys for Petitioner

August 19, 1997

Bowne of San Francisco, Inc., Law Printers

QUESTION PRESENTED

Whether, under the Clayton Act, as amended by the Robinson-Patman Act, injury to competition in a secondary-line price discrimination case is irrebuttably established by proof of injury to a competitor.

PARTIES TO THE PROCEEDING

Petitioner Osram Sylvania Products Inc. is a wholly-owned subsidiary of Osram Sylvania Inc. Osram Sylvania Inc. is a wholly-owned subsidiary of Siemens Corp. Siemens Corp. is wholly owned by Siemens AG and Osram GmbH, which is itself wholly owned by Siemens AG. Respondent Chroma Lighting is a closely held California corporation that has issued no shares to the public.

RULE 29.1 LISTING

Pursuant to Rule 29.1 Petitioner Osram Sylvania Products Inc. ("Sylvania") discloses that it does not have subsidiaries or affiliates that have issued shares to the public. Siemens AG, parent of Sylvania has issued shares to the public through its subsidiaries Duewag AG, Krefeld, Germany; Siemens Madrid, Spain; Siemens Pakistan; Siemens India; and Teleco CAVI, SpA, Roseto Degli Abruzzi, Italy. While Sylvania is the only defendant in the action, GTE Products Corporation ("GTE Products") was originally named as a defendant. GTE Products was sold to Osram Acquisition Corporation on January 29, 1993. Osram Acquisition was merged into GTE Products, and that entity was subsequently renamed Osram Sylvania, Inc. Although GTE Products was dismissed from the action after the sale, GTE Products' former parent company, GTE Products of Connecticut Corporation, retains some financial interest in the outcome of this case.[a]

---

[a]Petitioner's statement listing all parent companies and nonwholly owned subsidiaries of GTE Products of Connecticut Corporation appears, pursuant to Supreme Court Rule 29.6, in the Appendix at 33a.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
RULE 29.1 LISTING ii
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 2
STATUTORY PROVISION INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE PETITION 7
I. The Petition Should Be Granted To Determine Whether The Robinson-Patman Act Should Be Interpreted In A Manner That Conflicts With Or Complements The Other Antitrust Laws 8
A. Enactment Of The Robinson-Patman Act 10
B. This Court's Robinson-Patman Act Jurisprudence 14
C. The Conflict Among The Courts Of Appeals 19
D. The Ninth Circuit's Interpretation Of The Robinson-Patman Act Severely Impairs Economic Efficiency 21
CONCLUSION 24
APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Page

Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 21

Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824 (D. Md. 1938) 11

Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953) 15, 18, 19

Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676 (10th Cir. 1984) 20

Bob Nicholson Appliance, Inc. v. Maytag Co., 883 F. Supp. 321 (S.D. Ind. 1994) 21

In re Boise Cascade Corp., 107 F.T.C. 76 (1986) 8

In re Boise Cascade Corp., 113 F.T.C. 956 (1990) 17

Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988) 6, 20

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*

Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947) 15

Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949) 15

Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996) 13, 20

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 23

Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945) 15, 16

FTC v. Morton Salt, 334 U.S. 37 (1948) ..... *passim*

TABLE OF AUTHORITIES

CASES

Page

Falls City Indus., Inc. v. Vanco Beverage Co., 460 U.S. 428 (1983) 9, 17

Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 543 (9th Cir. 1983) 7

George Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929) 11

Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979) 18, 19

H.L. Hayden of N.Y. v. Siemens Medical Systems, 879 F.2d 1005 (2d Cir. 1989) 20

Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990) 17

Interstate Cigar Co. Inc. v. Sterling Drug, Inc., 655 F.2d 29 (2d Cir. 1981) 20, 21

J.F. Feeser, Inc. v. Serv-A-Portion, 909 F.2d 1524 (3d Cir. 1990) 6, 21

J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981) 17

Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir. 1937) 11

Mennen Co. v. FTC, 288 Fed. 744 (2d Cir. 1923) 11

National Biscuit Co. v. FTC, 299 Fed. 733 (2d Cir. 1924) 11

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), *cert denied*, 116 S. Ct. 515 (1995) .. 13

Richard Short Oil Co., Inc. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 20

TABLE OF AUTHORITIES

CASES

Page

Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939) 15

Standard Oil Co. v. United States, 221 U.S. 1 (1911) .. 10

Stelwagon Mfg. Co. v. Tarmac Roofing Sys. Inc., 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996) 21

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 18

Statutes

28 U.S.C. § 1254(1) 2

Rules

Fed. R. Civ. P. 54(b) 6

Legislative Material

Clayton Act, 38 Stat. 730 (1914) ..... *passim*

80 Cong. Rec. 6622 (1936) (Rep. Miller) 14

80 Cong. Rec. 9416 (Rep. Utterback) 13

FTC, *Final Report on the Chain Store Investigation*, Senate Document No. 4, 74th Cong. 1st Sess. (1935) 12

Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. (1935) 12, 14

H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936) ... 14

Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (1936) ..... *passim*
15 U.S.C. § 13(f) 19

S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) 13

TABLE OF AUTHORITIES

Miscellaneous

Page

Philip E. Areeda, *Antitrust Analysis* 895 (2d ed. 1974) 22

Robert H. Bork, *The Antitrust Paradox* 322 (rev. ed 1993) 17

Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L.J. 327 (1994) 22

Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice* § 14.6 (1994) .. 22

Paul H. Larue, *Robinson-Patman Act In The Twenty-First Century: Will The Morton Salt Be Retired*, 48 SMU L. Rev. 1917 (1995) 22

Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. Econ. & Org. 296 (1994) 22

Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* (1976) 8, 10, 17

Richard A. Posner, *Antitrust Law: An Economic Perspective* 212-214 (1976) 11

Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 23 (1962) 10, 11, 12, 14

United States Department of Justice, *Report on the Robinson-Patman Act* 12 (1977) 16, 22

No. 97-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

VS.

CHARLES T. VON DER AHE and
CHROMA LIGHTING,
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals for the Ninth Circuit issued its opinion in two parts. One portion of the opinion is reported at 111 F.3d 653 and is reproduced in the Appendix ("App.") to this petition at 1a. The other portion of the opinion is unreported and is reproduced at 14a. The unreported opinions and orders of the district court are reproduced at 24a and 26a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 10, 1997. The court of appeals denied petitioner's petition for rehearing on May 22, 1997. App. at 32a. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (1936) (Robinson-Patman), provides, in relevant part:

> It shall be unlawful for any person . . . to discriminate in price . . . where the effects of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

STATEMENT OF THE CASE

This case presents an opportunity to resolve an important, and much-disputed, question about the need to demonstrate actual injury to competition in price discrimination cases brought by allegedly disfavored buyers under the Robinson-Patman Act. In *FTC v. Morton Salt,* 334 U.S. 37 (1948), this Court held that evidence of injury to an individual competitor supports an inference of injury to competition in so-called "secondary-line" (or, buyer-level) price discrimination suits. The question posed here is whether a defendant may rebut that inference with evidence of vigorous competition in the relevant secondary-line market.

Embedded within that seemingly narrow procedural question is the fundamental and on-going policy debate over whether harm to competition — ordinarily the indispensable touchstone of antitrust analysis — is to play a meaningful role in secondary line price-discrimination cases. On the answer to that question rests, not only the coherence of our antitrust laws, but the configuration of many of the country's product distribution systems. Petitioner believes that the answer is clear, but the current uncertainty resulting from explicit disagreements among the courts of appeal and district courts is the worst answer of all.

1. *Factual Background.* Sylvania manufactures various lighting products. It competes with a number of large manufacturers, including General Electric and Philips. RT at 4039-40.[1] Sylvania and its competitors sell thousands of different lighting products to thousands of distributors. RT at 2953-54. Between 1987 and 1991, Sylvania accounted for only 36% of all such sales, both nationwide and in Southern California. ER at 1005.

Sylvania maintains a standard wholesale price list for its products. RT at 2549. It offers discounts in certain circumstances. For example, it sometimes will lower its prices to an individual distributor in order to match an offer by one of its competitors to that same distributor. RT at 2575-78. Sylvania will also lower its prices to a distributor to allow that distributor to meet an offer from a competing distributor to one of the distributor's customers. RT at 2549-64. Between 1987 and 1991, stiff competition from General Electric and Philips forced Sylvania to offer increasingly steep discounts

---

[1]Record citations to "RT at ____" are to Reporter's Transcript, and those to "ER at ____" are to the Excerpt of Record of Appellant Osram Sylvania, Inc. filed with the Ninth Circuit.

on an increasing percentage of its sales. RT at 2971-78, 2994-95, 3001-02.[2]

In 1987, Charles Von Der Ahe began distributing lighting products in Southern California, first through a sole proprietorship and later through a small corporation, Chroma Lighting. Mr. Von Der Ahe entered the market with virtually no business experience, a superficial acquaintance with complex lighting products, and an initial investment of $33,000. RT at 241-44, 1256-60, 1513, 4021. His business never turned a profit. RT at 1159-62. In 1991, three and one-half years later, Mr. Von Der Ahe shut his doors. RT at 654.

The distribution of lighting products in the Southern California market was intensely competitive throughout Mr. Von Der Ahe's business tenure. More than 200 firms sold lighting products in Los Angeles and Orange Counties alone. RT at 1513, 4021. Most of these firms, including Mr. Von Der Ahe's, represented multiple manufacturers. RT at 4055-58. The largest lighting distributor possessed only ten percent of the market. ER at 141. Barriers to entry were also quite low: 41 firms entered and prospered in the market while Mr. Von Der Ahe was in business. RT at 4075-79; ER at 1013.

2. *Proceedings In The Trial Court.* Two months after Mr. Von Der Ahe closed down, he sued Sylvania, blaming the failure of his business on Sylvania's allegedly discriminatory pricing practices.[3] After removal to the district court on diversity grounds, Mr. Von Der Ahe amended his complaint

---

[2]During that time, the percentage of sales on which Sylvania offered discounts increased from 45% to 75%. RT at 2971-73.

[3]Petitioner Osram Sylvania, Inc. (Sylvania) is the successor-in-interest to the company that sold lighting products to Mr. Von Der Ahe and his corporate alter ego, Chroma Lighting.

to allege an array of theories, including unfair competition, breach of the covenant of good faith and fair dealing, and, for the first time, price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The case was tried to a jury in Los Angeles. The bulk of the thirty-day trial focused on Sylvania's allegedly discriminatory pricing practices. As explained above, during the relevant time period, Sylvania offered its Southern California distributors, including Mr. Von Der Ahe, a number of discounts. Mr. Von Der Ahe claimed that, although Sylvania's prices were nominally the same, Sylvania extended what essentially were volume discounts to a handful of larger distributors. Based on this evidence and on the purported authority of this Court's decision in *Morton Salt*, the trial judge instructed the jury that it could infer injury to competition from proof that one of Mr. Von Der Ahe's competitors received a substantial discount. RT at 6647.

The jury found that Sylvania had violated Section 2(a) of the Robinson-Patman Act and returned a pre-trebling verdict of $1,175,000.[4] App. at 24a-25a. The jury also awarded punitive damages on the tort claim. *Id.* Sylvania moved for judgment as a matter of law on the Robinson-Patman Act claim, incorporating its trial-long argument that the evidence of intense competition in the relevant market negated any possible harm to competition as a matter of law. The

---

[4]The jury award rested largely, if not entirely, on testimony by Mr. Von Der Ahe. Although Mr. Von Der Ahe disclaimed any "economic analysis" as the basis of his damage studies, RT at 591, the district court allowed Mr. Von Der Ahe to testify as an "expert" on antitrust damages, despite appropriately characterizing his testimony as "a kind of mom and pop damages approach." RT at 587.

district judge denied the motion.[5] App. at 26a-28a; ER at 719-721.

3. *Proceedings In The Court of Appeals.* The court of appeals, Judges Browning, Norris and Reinhardt, affirmed.[6] As framed by the court, the sole question was "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." App. at 4a. In addressing that question, the court reviewed at length the conflicting opinions of the D.C. Circuit in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), which held that the *Morton Salt* inference of injury to competition was rebuttable, and of the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), which held, prior to this Court's decision in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that the inference of injury to competition was irrebuttable. App. at 4a-9a. Siding with *Feeser* and rejecting *Boise Cascade*, the court of appeals held that "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competi-

---

[5]The district judge granted Sylvania's motion challenging the jury's punitive damages award on Mr. Von Der Ahe's claim for intentional interference with prospective advantage. The judge ordered a remittitur or, alternatively, a new trial if Mr. Von Der Ahe rejected the remitted punitive award. Mr. Von Der Ahe insisted on a new trial. The district judge then entered judgment under Rule 54(b) of the Federal Rules of Civil Procedure on the Robinson-Patman and contract claims. App. at 26a-28a; ER at 722-726.

[6]The court of appeals reversed the jury verdict on Mr. Van Der Ahe's claim for breach of the covenant of good faith and fair dealing. App. at 23a. That aspect of the court of appeals decision is not at issue.

tion generally may not be overcome by proof of no harm to competition." App. at 13a.

The court acknowledged this Court's statement in *Brooke Group* that "by its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure *competition.*" App. at 12a, quoting *Brooke Group,* 509 U.S. at 218. The court found this statement inapplicable to claims of secondary-line price discrimination. It reasoned that "Congress' concern for the fate of individual competitors, as expressed in the legislative history of the Robinson-Patman Act, focused on secondary-line, not primary-line competition."App. at 12a. "Thus," it concluded, "the language added to the Clayton Act by the Robinson-Patman Act, and the legislative history that expresses Congress' solicitude for individual buyers, are still applicable in secondary-line cases, even though they are not applicable in primary-line cases after *Brooke Group.*" *Id.* [7]

REASONS FOR GRANTING THE PETITION

This court should grant the petition to consider the important issue left open by *Brooke Group* and to resolve the conflicts on that issue among the lower courts. Relying on *Morton Salt*, the court of appeals held that injury to an

---

[7]The court of appeals also declined to follow its own prior decision in *Foremost Pro Color, Inc. v. Eastman Kodak Co.,* 703 F.2d 534 (9th Cir. 1983). In that case, which also involved an alleged secondary-line injury, a different panel of the Ninth Circuit had held that a "naked demonstration of injury to a specific competitor without more is not sufficient" to establish the competitive injury requirement of Section 2(a) of the Robinson-Patman Act. *Id.* at 548. Instead, the court had held, "the test must always focus on injury to competition." *Id.* The court had reasoned that "neither Section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition." *Id.*

individual competitor irrebutably demonstrates injury to competition in a secondary-line price discrimination case even though the evidence proffered by Sylvania showed that inference to be utterly fictional in the case at bar. That conclusion misreads Section 2(a) of the Robinson-Patman Act, misinterprets the Act's legislative history, and, most important, needlessly prolongs the interpretive dissonance between the Robinson-Patman Act and the other antitrust laws, not to mention between the courts of appeals. This is an issue of great significance to the organization of distribution systems by tens of thousands of companies, in innumerable different lines of commerce whose legal rights and obligations are now subject to the conflicting interpretations of Section 2(a) of the Robinson-Patman Act.

I. The Petition Should Be Granted To Determine Whether The Robinson-Patman Act Should Be Interpreted In A Manner That Conflicts With Or Complements The Other Antitrust Laws.

The Robinson-Patman Act has long been regarded the black sheep of the antitrust family. While its Sherman and Clayton Act siblings have been comfortably harnessed to the service of economic efficiency and consumer welfare, the Robinson-Patman Act has continued to be invoked in the service of not merely different, but contrary, economic values.[8]

Yet, as is so often the case, the outcast is not so much different as misunderstood. Recognizing that fact, this

---

[8] *See, e.g., In re Boise Cascade Corp.*, 107 F.T.C. 76, 79 (1986) (Pitofsky, Comm'r, dissenting from issuance of complaint) (noting "the tension between the philosophies of the Sherman Act and the Robinson-Patman Act — a conflict created by Congress and left unresolved on the FTC's doorstep many years ago"); Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 38-42 (1976) ("Posner").

Court — over the past fifteen years — has begun to reorient the Robinson-Patman Act to bring it into congruence with the consumer welfare orientation of the antitrust laws generally. This case presents an important opportunity to continue (if not largely complete) that process.

It is an opportunity which, we respectfully submit, this Court should seize. There is no more important antitrust principle than that our Nation's competition laws protect and promote the health of competition, not the well-being of particular competitors. Often, those interests coincide: what is competition, after all, but vigorous individual firms striving with one another to expand output, improve quality or lower prices? Yet the desire of a particular firm to serve its interests by insulating itself from the superior competitive attributes of its rivals is not likely to be congruent with the well-being of the competitive process — and hence with consumer welfare — either in the short- or the long-run. It does not serve the goals of antitrust policy to reward the pursuit of that self-interest with treble damages where no failure of the competitive process itself exists.

That is the issue presented in this case. Under *Morton Salt,* if a buyer proves that it has been competitively injured as the result of price discrimination, the law infers *prima facie*[9] that such an injury adversely affects competition as well as the particular competitor. Whether that is a reasonable inference is fairly debatable. Yet, it does no serious harm to sensible antitrust enforcement so long as it may be rebutted by the defendant, through evidence showing that competition in the secondary-line *(i.e.,* buyers') market was not adversely affected as a result of the price differential. However, if — as under the decision below — the inference is treated as irrebuttable, thus becoming a rule of substan-

---

[9] *See Falls City Indus., Inc. v. Vanco Beverage Co.,* 460 U.S. 428, 434-435 (1983).

tive law, the Act becomes (at least in secondary-line cases) not another antitrust soldier in the service of consumer welfare but a competitive Fifth Columnist, undermining the goals of economic efficiency while purporting to wear its colors.

The fact that the issue comes before this Court clothed in the garb of a procedural rule should not mask its significance. The unmistakable fact about this ostensible rule of process is that it carries with it the answer to the fundamental antitrust question of whether actual — as opposed to merely nominal or theoretical — proof of injury to competition is to be part of a Robinson-Patman Act law in secondary line cases and, hence, whether congruence or dissonance between the Robinson-Patman Act and other antitrust statutes shall be the order of the day.

A. Enactment Of The Robinson-Patman Act.

Concern about price discrimination stretches back to the alleged practices of John D. Rockefeller's Standard Oil "Trust".[10] Standard Oil allegedly used profits from markets in which it had monopoly power to fund price cuts, below cost if necessary, to eliminate competition in other markets. *See Standard Oil Co. v. United States*, 221 U.S. 1, 32-33 (1911). Standard Oil also allegedly cut its costs by extracting secret rebates and allowances from the railroad cartels which transported its oil to market. *Id.* These practices[11] supposedly enabled Standard Oil to gain and main-

[10]For an extended discussion of the roots of the Robinson-Patman Act, see Frederick M. Rowe, *Price Discrimination Under the Robinson Patman Act* 3-11 (1962) ("Rowe") and Posner at 17-29.

[11]The practice of offering price discounts to take business from direct (often local) competition is now referred to as "primary-line" price discrimination because its impact falls on the

tain a monopoly over this country's oil industry. They were challenged under Section One of the Sherman Act. *Id.* However, when this Court affirmed the dismembering of Standard Oil, it left the legality of the company's pricing practices an open question. *Id.*

In response, Congress passed the Clayton Act, 38 Stat. 730 (1914). The Clayton Act prohibited price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *Id.* However, as interpreted by the courts, the statute had little impact. For one thing, lower courts concluded that the Clayton Act prohibited only primary-line price discrimination.[12] For another, lower courts required plaintiffs to show that the challenged pricing practices threatened to destroy competition in an entire line of commerce.[13] These interpretations of the Clayton Act, coupled with its blanket exception for quantity discounts, rendered its prohibition on price-discrimination a virtual dead-letter.[14]

---

discounter's competitors. The practice of offering the same product to competing buyers at different prices is referred to as "secondary-line" price discrimination because it affects the buyer's competitors. This terminological classification, however, post-dates the 1935-36 legislative debates on the Robinson-Patman Act. *See* discussion *infra* at 14-19.

[12] *See Mennen Co. v. FTC*, 288 Fed. 744 (2d Cir. 1923); *National Biscuit Co. v. FTC*, 299 Fed. 733 (2d Cir. 1924). This Court did not correct this misinterpretation of the Clayton Act until 1929 in *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245.

[13] *See, e.g., Lipson v. Socony Vacuum Corp.*, 87 F.2d 265, 269 (1st Cir. 1937); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 282 (D. Md. 1938). *See also* Rowe at 121 n.27; Richard A. Posner, *Antitrust Law: An Economic Perspective* 212-214 (1976).

[14] *See* Posner at 24.

The rapid growth of chain stores in the 1920s and 1930s put pressure on Congress for legislative reform.[15] Prior to the advent of chains, most goods reached consumers' hands after passing through a three tier distribution system: manufacturer, wholesaler and retailer. Chains revolutionized this system by combining many of these functions. Critics and competitors complained that the chains took unfair advantage of their obvious efficiencies by utilizing the price discrimination practices of the old "trusts": the chains were accused of using profits from markets they virtually monopolized to fund predatory price cuts in more competitive markets and of using their bargaining power to extract secret rebates and bogus advertising allowances from manufacturers. The chains, it was said, were poised to monopolize the retail trades and drive independent wholesalers and retailers out of business.

Prompted by these concerns and a 1935 report by the Federal Trade Commission ("FTC"), undertaken at Congressional direction,[16] Representative Patman introduced a bill to replace Section 2 of the Clayton Act.[17] The Patman Bill, H.R. 8442, and its companion, S. 3154, introduced by Senator Robinson, would have prohibited price discrimination regardless of its effect on competition. But hearings in the House uncovered two problems with such an absolute ban. *See Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. (1935). First, under the then-prevailing interpretation of the commerce clause, Congress arguably had power only over actions which threatened to injure interstate com-

---

[15] *See generally* Rowe at 8-11; Posner at 25-26.

[16] FTC, *Final Report on the Chain Store Investigation*, Senate Document No. 4, 74th Cong., 1st Sess. (1935).

[17] A fuller recounting of the legislative history of the Robinson-Patman Act can be found in Rowe at 11-23.

merce. *See id.* at 144, 239. If it failed to limit its prohibition to price discrimination that injured such competition, Congress risked having its ban struck down. *See id.* at 28. Second, supporters of the measure seemed to define "price discrimination" as the offer of different prices on the same good to competing buyers; a ban on price-discrimination so defined would not reach primary-line price discrimination. *See id.* at 212-13, 252.[18]

To address these and other concerns, supporters of the measures added an effects clause to the Patman and Robinson bills. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). They started with the language from the original Clayton Act prohibiting price discrimination that was likely to substantially "lessen competition or tend to create a monopoly in any line of commerce." To this they added language prohibiting price discrimination that might "injure, destroy, or prevent competition with any person who either grants or receives the benefits of such discrimination, or with customers of either of them."[19]

---

[18] *Pace Rebel Oil, Inc. v. Atlantic Richfield, Co.*, 51 F.3d 1421, 1446 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) ("Congress clearly intended the Robinson-Patman Act's provision to apply only to secondary-line cases, not primary-line cases."). *See also Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 192 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996) (same, relying on *Rebel Oil*).

[19] The debates over the Act, cast in the traditional language of the Sherman Act, focused on monopoly and the threat to competition posed by price discrimination — not, as mythology would have it, on protecting individual competitors. *See, e.g., Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, Cong., 1st Sess. 6 (1935) (Rep. Patman) ("If chains were to get control of this county we would have a monopoly and along with that monopoly would come higher

The crucial words in the resulting effects clause of the Robinson-Patman Act are "injure, destroy or prevent competition." These words identify the thing — price discrimination that affects competition — which the Act prohibits. The phrase "with any person" simply underscores the fact that the Act prohibits price discrimination which has the potential to affect competition in any line of commerce, primary, secondary or tertiary. Thus, whatever populist sentiment animated the drive to reform the Clayton Act, the Robinson-Patman Act limited its prohibition to practices which pose a reasonable possibility of injuring "competition".[20]

B. This Court's Robinson-Patman Act Jurisprudence.

In the years following enactment of the Robinson-Patman amendments, the courts and the FTC struggled with the

---

prices."); 80 Cong. Rec. 6622 (1936) (Rep. Miller) ("[T]he Clayton Act was a step forward in the suppression of practices by which monopolies and restraints are promoted the present bill is merely another step in the same direction."). As the chief commentator on the Act put it, "[i]n the end of the Robinson-Patman Compromise of 1936 was the offspring of a mixed marriage between antitrust and NRA, born with a legal split personality." Rowe at 23.

[20]This Court read the Robinson-Patman Act precisely this way in *Brooke Group*. *See infra* at 18. Accepted canons of statutory construction require that courts give identical meaning to the same words in different parts of the same statute. *See Commissioner of Internal Revenue v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995). It surely follows that courts should give the same meaning to the same words in the same part of the same statute. *See United States v. Nippon Paper Indus., Co.*, 109 F.3d 1, 4 (1st Cir. 1997), *petition for cert. filed* (June 13, 1997) (No. 96-1987).

Act's "infelicitous language."[21] Among the many questions raised by the Act were whether it prohibited a seller's refusal to deal with a buyer on any terms,[22] how close in time two sales must occur to be discriminatory,[23] and what kinds of transactions constitute a "sale".[24]

Not until 1945, in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, did this Court confront the meaning of the effects clause in the Robinson-Patman Act. Corn Products challenged the FTC's finding that it violated the Act by selling glucose at delivered prices with freight calculated from Chicago, even though it delivered glucose from both Kansas City and Chicago. Among other things, Corn Products argued that its delivered pricing system could not have the proscribed effect on competition.

This Court upheld the FTC's finding that Corn Products' delivered pricing scheme violated the Act. It explained that the Act was "designed to reach discriminations in their incipiency, before the harm to competition is effected." *Id.* at 738. "It is enough," this Court held, "that they 'may' have the prescribed effect." *Id.* This Court found that the facts "readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition." *Id.* at 739.

Three years later — and for the last time to date — this Court addressed the meaning of "competition" in a secon-

---

[21] *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 78 (1953).

[22] *See, e.g., Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939).

[23] *See, e.g., Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947).

[24] *See, e.g., Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 8 (7th Cir. 1949).

dary-line price discrimination claim in *Morton Salt*. In that case, Morton Salt challenged the FTC's finding that its practice of giving customers a 10 cent per case discount for taking shipments in carload lots violated the Robinson-Patman Act. The company claimed that more than ninety-nine percent of its customers received the discount. It also pointed out that salt is but one of many items stocked by grocery stores. Hence, it argued, the discount simply could not have the requisite effect on competition among grocers.

This Court affirmed the FTC's finding that Morton Salt's car load discounts violated the Robinson-Patman Act. Following *Corn Products*, it held that the Robinson-Patman Act does not require actual proof of injury to competition. Rather, it held, the Robinson-Patman Act prohibits pricing schemes that have a reasonable possibility of harming competition. In this Court's view, the evidence before the FTC was sufficient to show that the less-than-carload purchasers might have been handicapped by Morton Salt's carload discount. *Morton Salt*, 334 U.S. at 49-50. Refusing to circumscribe the Commission's enforcement of the Act by requiring it to prove an actual impact on competition, this Court held that the Commission could infer the requisite injury to competition from proof of sales to competing buyers entailing a substantial price difference over time. *Id.* at 50.

Neither *Corn Products* nor *Morton Salt* addressed the evidentiary significance of the inference. The cases did not state whether the "inference" of injury to competition was rebuttable and, if so, with what evidence. Seizing upon the absence of such discussion, the FTC proceeded to enforce the Act with such rigor that the so-called "*Morton Salt* inference" became in the eyes of some a conclusive presumption: "Once an inference to secondary line competitive injury is established under the *Morton Salt* inference, direct evidence to the contrary may not overcome the *Morton Salt*

inference." United States Department of Justice, *Report on the Robinson-Patman Act* 12 (1977). From this gloss — doubtless due to the Act's New Deal era origins — emerged an assumed and oft-times lamented tension between the supposed competitor focus of the Robinson-Patman Act and the consumer welfare policies of the country's other antitrust laws.[25]

Yet this Court's jurisprudence in the past two decades reflects an unmistakable effort to narrow, if not close entirely, the interpretative gulf between the Robinson-Patman Act and other antitrust statutes. And that has been true across a wide range of issues, including damages, causation and competition policy. First, in *J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), this Court held that *Morton Salt* does not support an "automatic" award of damages under Section 4 of the Clayton Act. Rather, to recover damages in a secondary-line price discrimination case, a "plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* at 558. Shortly thereafter in *Falls City Indus., Inc. v. Vanco Beverage Co.*, 460 U.S. 428 (1983), this Court concluded that a defendant could overcome the *Morton Salt* inference with "evidence breaking the causal connection between a price differential and lost sales or profits." Id. at 435. Third, in *Hasbrouck v. Texaco, Inc.*, 496 U.S. 543, 559 (1990), this Court held that a defendant could defeat a secondary-line claim altogether with proof that "a price differential . . . merely accords due recognition and reim-

---

[25] For such a juxtaposition of the Robinson-Patman Act and the Sherman Act see Commissioner Calvani's discussion in the FTC's order in *In re Boise Cascade Corp.*, 113 F.T.C. 956, 968-973 (1990). *See also* Robert H. Bork, *The Antitrust Paradox*, 322 (rev. ed. 1993) (calling the Robinson-Patman Act "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory"); Posner at 38-42 (same).

bursement for actual marketing functions." *Id.* at 562. Throughout this period, this Court has expressed its concern for "interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act . . . [thus] giving rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979), quoting *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63 (1953).[26]

Most significant, four years ago, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court directly confronted and rejected the argument that the Robinson-Patman Act, contrary to the antitrust laws generally, is concerned with the welfare of particular competitors as opposed to the health of the competitive process:

> By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on costs, § 13(a), "changing conditions affecting the market or the marketability of the goods concerned," ibid., or conduct undertaken "in good faith to meet an equally low price to a competitor, § 13(b), confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson-Patman Act should be construed consistently with the broader policies of the antitrust laws.

Id. at 220 (citations omitted).

---

[26]This Court similarly reconciled the Sherman Act with the Robinson-Patman Act in *United States v. United States Gypsum Co.*, 438 U.S. 422, 447-459 (1978).

That language not only speaks directly to the issue in this case, but would appear to dispose of it. Indeed, while *Brooke Group* was a primary-line case, nothing in the language or the logic of the Court's opinion suggests that the concept of competition in the Robinson-Patman Act should be interpreted differently in secondary-line cases. To the contrary, the opinion expressly relied on two secondary-line cases, *Automatic Canteen* and *Great Atlantic & Pacific Tea Co.*,[27] to support the point that the statute protects competition, not competitors, from price discrimination. At a minimum, this case would appear to be a logical follow-on to *Brooke Group*, providing, as it does, an opportunity for the Court to consider whether that decision's logic extends, as we believe it does, to secondary-, as well as primary-, line cases.

C. The Conflict Among The Courts Of Appeals.

Although this Court's jurisprudence points towards the elimination of any substantive difference between the Robinson-Patman Act and antitrust law generally, the decision below adopted a procedural analysis fundamentally inconsistent with the consumer welfare norms which underlie antitrust law generally. Contrary to the statements in *Brooke Group* that "[e]vidence of below cost pricing is not alone sufficient to permit an inference of ... injury to competition", *id.* at 210, and that "competent evidence is necessary to allow a reasonable inference that [predatory pricing] poses an authentic threat to competition", *id.* at 232, the Ninth Circuit found in the Robinson-Patman Act an inference of competitive harm that is irrebutable by evidence of vigorous competition. In so holding it aggra-

---

[27] Buyer liability cases under Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f), have the same secondary-line competitive injury requirement as seller liability cases under Section 2(a). *See, e.g., Great Atlantic & Pacific Tea Co.*, 440 U.S. at 77.

vated an explicit split among the courts of appeals and the district courts. This petition presents this Court with a much-needed opportunity to resolve this conflict:

1. In *Boise Cascade*, Judge Starr, writing for the court over the dissent of Judge Mikva, held that "[i]njury to competition is . . . the name of the Robinson-Patman game." 837 F.2d at 1143. Boise Cascade had tried to overcome the *Morton Salt* inference before the FTC with evidence that its industry was "characterized by intense competition", *id.* at 1135, and that "competition among dealers was generally healthy", *id.* at 1443. The FTC had dismissed this evidence as irrelevant. The D.C. Circuit reversed, explaining that "Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws." *Id.* at 1138.[28]

---

[28] Dicta from numerous opinions of the courts of appeals are to the same effect: "[A] violation of 15 U.S.C. § 13(a) requires not only proof of price discrimination, but a potential impact substantially to lessen competition or create a monopoly in any line of commerce," *H.L. Hayden of N.Y. v. Siemens Medical Systems*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989) (secondary-line case); "[A]nalysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses," *Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (secondary-line case); "The primary purpose of the Act is to protect the competitive process, not individual competitors," *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984) (secondary-line case). *See also Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.) (citing *Boise Cascade* approvingly but holding that the defendant had failed to rebut the inference of injury to competition), *cert. denied*, 117 S. Ct. 294 (1996); *Interstate Cigar Co.*,

2. At least two courts of appeals, in addition to the Ninth Circuit, have come to the opposite conclusion. In *Feeser*, the Third Circuit held that in secondary-line cases injury to a competitor conclusively satisfies the Robinson-Patman Act's competitive injury requirement. 909 F.2d at 1535. The court explained that, although the Sherman Act protects only competition, the Robinson-Patman Act "extends its protection to competitors." *Id.*[29] Likewise in *Alan's of Atlanta v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990), the Eleventh Circuit held that in secondary-line cases, "injury to competition is proved by showing an injury to competitors." *Id.* at 1418 n.6. The court stressed that in such cases "the legal focus of the competitive injury inquiry is on the competitor, not the consumer." *Id.*

D. The Ninth Circuit's Interpretation Of The Robinson-Patman Act Severely Impairs Economic Efficiency.

By turning evidence of a significant price difference into an irrebuttable inference of injury to competition, the decision below severely limits manufacturers' ability to engage in legitimate price competition. Manufacturers who respond to price competition (as Sylvania did) face the threat of

---

Inc., v. Sterling Drug Inc., 655 F.2d 29, 31 (2d Cir. 1981) (stating that showing of injury to competition is an essential condition precedent to establishing a claim of price discrimination); *Bob Nicholson Appliance, Inc. v. Maytag Co.*, 883 F. Supp. 321, 326 (S.D. Ind. 1994) (holding "that the Seventh Circuit would extend the reasoning of *Brooke Group* to secondary line competitors and require actual injury to competition").

[29]The Third Circuit, in the wake of *Brooke Group*, but without discussing it, reaffirmed its pro-competitor reading of the Robinson-Patman Act in *Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (1995), *cert. denied*, 116 S. Ct. 1264 (1996).

antitrust litigation and the possibility of treble damages, even though their pricing practices cannot injure competition. Manufacturers, distributors and retailers must either refrain from engaging in legitimate price competition or go to great expense to create and implement complicated "meeting competition" and "cost justification" procedures in order to defend distribution practices which not only are welfare maximizing but can have no adverse impact on competition. Ultimately, consumers bear the burdens of increased price rigidity[30] and the costs of elaborate (and chimerical[31]) compliance procedures. Simply put, the issue posed matters.[32]

---

[30]For dated estimates of these burdens, see Yale Brozen's foreword to Posner at ii-v and the Department of Justice's *Report on the Robinson-Patman Act* at 37-99. *See also* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. Econ. & Org. 296, 298 (1994) (stating that interpreting the Robinson-Patman Act to prohibit all price discounts not functionally available to everyone "unambiguously reduces welfare").

[31]*See, e.g.*, Philip E. Areeda, *Antitrust Analysis* 895 (2d ed. 1974) (explaining that the cost justification defense "is a mere illusion that traps the unwary")

[32]*See* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice* § 14.6a, 524 (1994) (arguing that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue."); Paul H. Larue, *Robinson-Patman Act In the Twenty-First Century: Will the Morton Salt Rule Be Retired*; 48 SMU L. Rev. 1917 (1995) (same); Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L. J. 327 (1994) (same).

Even the Ninth Circuit recognized that its interpretation of the Robinson-Patman Act will necessarily diminish the very thing that the Nation's other antitrust laws aim to maximize: consumer welfare. App. at 6a-8a. But there is no inherent conflict between the Robinson-Patman Act and the Nation's other antitrust laws. All protect the process of competition.

Properly interpreted, *Morton Salt* should simply bestow a rebuttable presumption upon the plaintiff, either the FTC or a private party, in a secondary-line price discrimination case. It should permit the plaintiff to make a *prima facie* case by showing that it was likely injured by a substantial price difference accorded a competitor. The burden should then fall on the defendant to present evidence, structural or otherwise, that its practices are not likely to injure competition in that market. The plaintiff should then be permitted to rebut the defendant's showing either with different structural evidence or with evidence showing that injury to him is tantamount to injury to competition.

Of course in some cases — like this one — the evidence may be so clear as to allow only one conclusion. In others, the effects evidence may be ambiguous or contested. In either event, adjudication of a secondary-line price discrimination case under the Robinson-Patman Act should proceed much like a vertical non-price restraint case under Section One of the Sherman Act, focusing on the ultimate question of whether the challenged practice threatens consumer welfare.

So interpreted, the *Morton Salt* inference would not be transformed, as it was by the court below, into a type of *per se* rule completely at odds with the competition policy which governs product distribution generally. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER, EHRMAN, WHITE
& MCAULIFFE
333 Bush Street
San Francisco, California 94104

JAMES A. GAAS
JONATHAN STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01902
Attorneys for Petitioner

No. 94-55581

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California Corporation: and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,

v.

GTE PRODUCTS CORPORATION,
a Delaware Corporation, et al.,
Defendants,

and

SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware Corporation,
Defendant-Appellant.

D.C.No.
CV-91-6424-WDK

OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge. Presiding

Argued and Submitted
August 8, 1995 — Pasadena, California
Filed April 10, 1997

Before: James R. Browning, William A. Norris, and
Stephen Reinhardt, Circuit Judges

Opinion by Judge Norris

SUMMARY

Antitrust/Robinson-Patman

The court of appeals affirmed a judgment of the district court. The court held that in a price-discrimination action under the Robinson-Patman Act, injury to competition is conclusively established by proof of an injury to an individual competitor.

Appellee Charles Von Der Ahe, dba Chroma Lighting, was a distributor of Osram Sylvania products. Von Der Ahe sued Sylvania for price discrimination under the Clayton Act, as amended by the Robinson-Patman Act, alleging that Sylvania had extended discounts to Von Der Ahe's competitors without offering them to him, and that he had been injured by Sylvania's discriminatory practices.

A jury found for Von Der Ahe and awarded him treble damages. Sylvania moved for judgment as a matter of law on the ground that the evidence was insufficient to support a finding of injury to competition. The district court denied the motion.

On appeal, Sylvania contended that Robinson-Patman condemns price discrimination only to the extent that it threatens to injure competition, and that the statute should be construed consistently with the broad policy of the antitrust laws to protect competition, not individual competitors.

Von Der Ahe countered that in a secondary-line Robinson-Patman case (involving pricing discrimination that affects competition among buyers, vs. primary-line cases involving discrimination that affects sellers of the same goods), injury to competition is conclusively established by proof of injury to a competitor, and that the inference of competitive injury may not be rebutted by evidence that competition was not adversely affected.

[1] Competitive injury in a secondary-line Robinson-Patman case may be inferred from evidence of injury to an individual competitor. [2] The Robinson-Patman Act prohibits price discriminations that tend "to injure, destroy, or prevent competition." [3] This language expresses congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination.

[4] Congress amended the Clayton Act specifically to extend its protection to individual competitors. [5] Congress's concern for individual competitors focused on secondary line — not primary line — competition, and added protection against injury to small retailers. [6] In a secondary-line case, the inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition.

COUNSEL

M. Laurence Popofsky, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the defendant-appellant.

Barry R. Laubscher, Grant & Laubscher, Irvine, California, for the plaintiffs-appellees.

OPINION

NORRIS, Circuit Judge:

Plaintiff Charles Von Der Ahe, d/b/a Chroma Lighting, was a distributor of Osram Sylvania lighting products. After going out of business, Von Der Ahe sued Sylvania for price discrimination in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act of 1936, 15 U.S.C. § 13(a), and for recovery under California tort law. On the Robinson-Patman claim, Von Der Ahe alleged that Sylvania had given discounts to Von Der Ahe's

larger competitors, without offering the same discounts to Von Der Ahe, and that Von Der Ahe had been injured by Sylvania's discriminatory practices. The jury found for Von Der Ahe on all counts and awarded treble damages of $3,525,000. ER at 719-20. After trial, Sylvania moved for judgment as a matter of law, alleging, *inter alia*, that there was insufficient evidence to support a finding of injury to competition on the Robinson-Patman claim. ER at 438-40. The district court denied the motion. Sylvania appeals from the denial of its post-trial motion and from the judgment. On appeal, Sylvania claims that the evidence at trial was insufficient as a matter of law to support the jury's finding of injury to competition.[1]

[1] In *FTC v. Morton Salt*, 334 U.S. 37 (1948), the Court held that competitive injury in a secondary-line[2] Robinson-Patman case may be inferred from evidence of injury to an individual competitor. More specifically, *Morton Salt* permits a factfinder to infer injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of individual merchants, and thus create a "reasonable possibility" that competition itself may be harmed. *Id.* at 46-47. The question presented by Sylvania's appeal is whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy. This question was left open by *Morton Salt*, and the circuits

---

[1] All other issues raised by Sylvania's appeal are disposed of in a memorandum disposition filed herewith.

[2] Secondary-line price discrimination affects competition between buyers of a discriminating seller's goods, while primary-line discrimination affects competition between a discriminating seller and others who sell the same goods.

are divided on the issue. The D.C. Circuit, for example, has held that the inference of competitive injury may be rebutted by a showing of no actual harm to competition because the Robinson-Patman Act must be construed in light of the pro-competitive purpose of all other antitrust legislation. *Boise Cascade Corp. v. FTC,* 837 F.2d 1127, 1144 (D.C. Cir. 1988). The Third Circuit, on the other hand, has held that the inference of competitive injury may not be overcome by evidence of no harm to competition because the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general. *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3rd Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

Appellant Sylvania argues that we should follow *Boise.* Like *Boise*, Sylvania reasons that the Robinson-Patman Act condemns price discrimination only to the extent that the discrimination threatens to injure competition, and that the Act should be construed consistently with the broader policies of the antitrust laws to protect competition, not individual competitors. Appellee Von Der Ahe argues that injury to competition in a secondary-line Robinson-Patman case is conclusively established by proof of injury to a competitor, and that the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected. We agree with Von Der Ahe and the Third Circuit, and affirm the jury verdict for Von Der Ahe on the Robinson-Patman claim.

I

[2] The Robinson-Patman Act reads in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be sub-

> stantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . .

15 U.S.C. § 13(a). In *Boise*, the D.C. Circuit held that the language of the Robinson-Patman Act, which prohibits price discriminations that tend "to injure, destroy, or prevent competition," indicates that Congress was concerned about the preservation of competition, and not the protection of individual competitors. *Boise*, 837 F.2d at 1143. In making this argument, the D.C. Circuit attempted to reconcile Robinson-Patman with other antitrust laws, whose purpose is to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Asserting that harm to competition is "the name of the Robinson-Patman game," *id.* at 1143, the D.C. Circuit reasoned that it would "def[y] both logic and the import of *Morton Salt*" to hold that an inference of competitive injury derived from evidence of harm to individual competitors may not be overcome when there is no actual harm to competition. *Id.* at 1144.

In dissent, Judge Mikva criticized the majority in *Boise* for following its own economic philosophy rather than interpreting the specific language and legislative history of the Robinson-Patman Act. *Id.* at 1152-53 (Mikva, J., dissenting). First, Judge Mikva accused the majority of overlooking the statutory language, which expressly proscribes price differentials that tend "to injure, destroy, or prevent competition *with any person*" who enjoys the benefits of the differential. *Id.* at 1157. This language, in Judge Mikva's view, shifts the focus of the statute from protecting competition to protecting individual disfavored buyers from the loss of business to favored buyers.

Judge Mikva cited *Morton Salt*'s language that "Congress intended to protect *a merchant* from competitive injury

attributable to discriminatory prices." *Id.* (quoting *Morton Salt*, 334 U.S. at 49). In his view, this intent to protect individual merchants explains why *Morton Salt* permits a finding of injury to competition based on a showing of injury to an individual competitor victimized by the discrimination. *Id.* (citing *Morton Salt*, 334 U.S. at 49). Judge Mikva argued that this language in *Morton Salt* shows that the Court interpreted Robinson-Patman as dispensing with the need to show injury to competition. *Id.* at 1154. Finally, Judge Mikva noted that the Supreme Court had once addressed the issue of how to rebut the *Morton Salt* inference by creating a "*specific* type of rebuttal evidence" — "evidence breaking the causal connection between a price differential and [an individual competitor's] lost sales or profits" — and thus implicitly rejecting other methods for overcoming the inference. *Id.* (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435, (1998)).

Judge Mikva found support for his position in the legislative history:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions . . . whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved.

Id. at 1158 (quoting H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936)). Judge Mikva chastised the majority for interpreting Robinson-Patman according to its own version of antitrust policy, when the statutory language and the legislative history both show that Congress has already

adopted its own policy of protecting individual merchants as a means of protecting competition. *Id.* at 1153.

In *Feeser*, the Third Circuit agreed with Judge Mikva that the Robinson-Patman Act proscribes secondary-line price discrimination that injuries individual competitors. *Feeser*, 909 F.2d at 1533. The Third Circuit pointed out that the language "may be substantially to lessen competition or tend to create a monopoly," which had been part of the 1914 version of the Clayton Act, refers generally to broad impacts on competition, while the Robinson-Patman Act added the language "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination" specifically to protect the ability of individual companies to compete. *Id.* at 1532.

The Third Circuit also found support in the legislative history. First, the Third Circuit cited the Senate Report to show that Congress had intended to target injury to individual competitors as an appropriate means to protect competition in the long run, *i.e.* "to catch the weed in the seed." *Id.* at 1533 (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)). Second, the floor statement of a congressman in charge of the Conference Report for the Robinson-Patman Act shows that the language "to injure, destroy, or prevent competition with any person" was added to prohibit injury to the "immediate competition with the grantor or grantee" of a price discrimination. *Id.* (quoting 80 Cong. Rec. H9417 (1936) (statement by Rep. Utterback)). Thus, the Third Circuit's reading of the legislative history is in accord with Judge Mikva's reading that Congress amended the Clayton Act to expand its protection to individual competitors.

The Third Circuit also relied on *Morton Salt* in stating that it is "self-evident" that when sellers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers, there is a reasonable possibility that competition may be harmed. *Id.*

(citing *Morton Salt*, 334 U.S. at 50-51). It also cited dictum from *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.), that a Robinson-Patman claim differs in nature from a Sherman Act claim because the Sherman Act protects competition, while the Robinson-Patman Act protects "*those who compete* with a favored seller, not just the overall competitive practice." *Id.* at 1535 (quoting *Monahan's Marine*, 866 F.2d at 529).[3]

II

[3] We agree with Judge Mikva and the Third Circuit. We are persuaded that the language that the Robinson-Patman Act added to § 2(a) of the Clayton Act — "to injure, destroy, or prevent competition" — expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination. As we said in *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995) (dicta), "[t]he purpose of this passage was to relieve secondary-line plaintiffs — small retailers who are disfavored by discriminating suppliers — from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors." *See also* 3 Earl W. Kintner & Joseph P. Bauer, Federal Antitrust Law §§ 19.2, 22.4 (1983) (addition of phrase "to injure, destroy, or prevent competition with any person" was to expand

---

[3]Several other circuits have addressed this issue, though without the same depth of analysis found in *Boise* and *Feeser*. *Compare Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6. 1426 (11th Cir. 1990) (Robinson-Patman Act focuses on injury to competitors, not to competition), *with Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (alternative holding) (Robinson-Patman Act focuses on injury to competition, not to competitors), *and Motive Parts Warehouse v. Faces Enterprises*, 774 F.2d 380, 395 (10th Cir. 1985) (same).

protection of original Clayton Act to individual competitors).

[4] We also agree with the Third Circuit and Judge Mikva that the legislative history confirms that Congress amended the Clayton Act specifically to extend its protection to individual competitors. Congress passed the Robinson-Patman Act primarily out of concern for small retailers who could not compete with large chain-store purchasers because they could not buy in quantity. *See Falls City*, 460 U.S. at 436; *FTC v. Morton Salt Co.*, 334 U.S. at 49. The House Report shows that the Act was animated by concern for "the survival of independent merchants, manufacturers, and other businessmen." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936); *see also* Lawrence Anthony Sullivan, Handbook of the Law of Antitrust § 225(a) (finding support in legislative history for construing Robinson-Patman Act to protect individual small competitors irrespective of efficiency concerns).

III

Sylvania also relies upon *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984), a secondary-line case which stated that the Robinson-Patman Act, like other antitrust laws, must be construed to protect competition, not individual competitors.[4] *Foremost Pro* held that to survive a Rule 12(b) (6) motion, a plaintiff must allege injury to competition generally, not just injury to a specific competitor, because "[i]njury to a specific competitor is not enough from which a court may infer that an alleged price discrimination may 'substantially' injure competition." *Id.* Although *Foremost Pro* had no occasion to address the issue presented

[4] *Foremost Pro* was later cited with approval by the D.C. Circuit in *Boise*, 837 F.2d at 1143.

in this appeal — whether an inference of competitive injury may be overcome by a showing of no actual harm to competition — its sweeping statement that the Robinson-Patman Act must be construed to protect competition, not competitors, lends support to Sylvania's position that a defendant in a secondary-line price discrimination case must be permitted to make a showing of no harm to competition.

We believe, however, that *Foremost Pro* is no longer the law of this circuit because it was overruled, *sub silentio*, by *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987), *aff'd.* 496 U.S. 543 (1990). Without discussing *Foremost Pro*, *Hasbrouck* held that harm to competition in a secondary-line Robinson-Patman case may be inferred from evidence of harm to an individual competitor. *Id.* In so holding, *Hasbrouck* relied on *Falls City*, 460 U.S. at 435-36, a case decided after *Foremost Pro*. *Falls City* held that injury to competition may be inferred from proof of a substantial price discrimination between competing purchasers over time. *Id.* at 435. By relying on *Falls City* rather than on *Foremost Pro*, *Hasbrouck* appears to have interpreted *Falls City* as undermining the holding of *Foremost Pro*. *See Fadhl v. City and County of San Francisco*, 859 F.2d 649, 648 (9th Cir. 1986) (three judge panel may reconsider Ninth Circuit precedent if intervening Supreme Court decision undermines that precedent). We note in addition that *Hasbrouck*'s holding is consistent with *Morton Salt*'s reasoning that the Robinson-Patman Act "was intended to justify a finding of 'injury to competition by a showing of injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)). Because we are no longer bound by the reasoning of *Foremost Pro*, we are free to decide the question left open by *Morton Salt*, *Falls City*, and *Hasbrouck*, *i.e.* whether proof of harm to an individual competitor gives rise to an irrebuttable presump-

tion of competitive injury in a secondary-line price discrimination case.

IV

Finally, Sylvania relies on *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). *Brooke Group*, a primary-line price discrimination case, reasons that "[b]y its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure *competition*," and therefore holds that the Act must be construed consistently with the broader policies of the antitrust laws to protect competition, not competitors. *Id.* at 2586. Sylvania claims that the *Brooke Group* reasoning applies with equal force to secondary-line price discrimination claims.

[5] We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims. First and foremost, Congress' concern for the fate of individual competitors, as expressed in the legislative history of the Robinson-Patman Act, focussed on secondary-line, not primary-line competition. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 191-92 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996); *Henry v. Chloride*, 809 F.2d 1334, 1339 (8th Cir. 1987); 3 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 720c (1978). Since the original Clayton Act addressed only primary-line injury, Congress passed the Robinson-Patman Act to add protection against secondary-line injury, more specifically against injury to small retailers. *Coastal Fuels*, 79 F.3d at 192. Thus, the language added to the Clayton Act by the Robinson-Patman Act, and the legislative history that expresses Congress' solicitude for individual buyers, are still applicable in secondary-line cases, even though they are not applicable in primary-line cases after *Brooke Group*. *See id.* at 191-93

(*Morton Salt*'s inference of competitive injury still good law after *Brooke Group* because *Brooke Group* applies only to primary-line injury cases). Second, *Brooke Group* said that Robinson-Patman protects competition, not competitors, in the context of analogizing primary-line price discrimination claims to Sherman Act predatory pricing claims. The same analogy may not be made to secondary-line price discrimination claims. *Id.* at 193.

Conclusion

[6] We hold that in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition.

We AFFIRM the judgment on the Robinson-Patman claim.

PRINTED FOR
ADMINISTRATIVE OFFICE — U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC — SAN FRANCISCO — (800) 888-3400

The summary, which does not constitute a part of the opinion of the court, is copyrighted
©1997 by Barclays Law Publishers.

No. 94-55581

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California corporation; and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,
v.
GTE PRODUCTS CORPORATION
a Delaware corporation, et al.,
Defendants,
and
SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware corporation,
Defendant-Appellant.

Filed April 10, 1997
Cathy A. Catterson, Clerk,
U.S. Court of Appeals
D.C. No. CV-91-6424-WDK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding
Argued and Submitted August 8, 1995
Pasadena, California

Before: BROWNING, NORRIS, and REINHARDT,
Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Sylvania asserts it is entitled to judgment as a matter of law on its Robinson-Patman claim because (1) Von Der Ahe failed to prove essential elements of his case for liability; (2) Von Der Ahe failed to prove antitrust damages; and (3) Sylvania established the meeting competition defense. In the alternative, Sylvania seeks a new trial on the Robinson-Patman claim on the ground that the district court gave an erroneous jury instruction on the meeting competition defense. Finally, Sylvania argues that Von Der Ahe's claim of breach of the implied covenant of good faith and fair dealing should have been barred as a matter of California law. We address each of these issues in turn.[1]

ROBINSON-PATMAN CLAIM

We review the denial of judgment as a matter of law *de novo*.[2] *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Id.*

Elements of a Prima Facie Case

To establish a violation of the Robinson-Patman Act, a plaintiff must show that a defendant made contemporaneous sales of goods of like grade and quality to competing

[1]Sylvania's argument that it is entitled to judgment as a matter of law on the Robinson-Patman claim because it rebutted any inference of competitive injury by showing no harm to competition is disposed of in a published opinion filed herewith.

[2]Von Der Ahe's assertion that the abuse of discretion standard applies is contrary to established Ninth Circuit law, and is not supported by *Transgro, Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985), as Von Der Ahe claims.

customers at different prices. *See* Lawrence Anthony Sullivan, Handbook of the Law of Antitrust § 217 (1977).

Sylvania first argues that Von Der Ahe presented no evidence of CNA price differences on *actual* sales. However, Sylvania's own expert testified that the prices Von Der Ahe paid on actual CNA sales were 2.38% less favorable than the prices paid for the same items by West-Lite and Regency. RT 4167-71; D. ER. 1014 (Exh. 5131). Moreover, Sylvania's assertion that a 2.38% difference is *de minimis* was refuted by Rostvold's testimony that in the lamp business, a 2% difference in price would cause a customer to choose one distributor over another. RT 1533.

Second, Sylvania argues that Von Der Ahe made no effort to show that he actually competed against West-Lite and Regency for the sale of the particular lamp types subject to discriminatory prices. However, Von Der Ahe did present evidence that he competed with West-Lite and Regency on a "core" 20% of lamp types, which constituted 80% of Von Der Ahe's and his competitors' businesses, and that all lamp types were subject to price discriminations based on volume discounts and profit incentive programs. RT 164, 404-06, 421, 551-59, 2631-32, 3889.

Sylvania also argues that Von Der Ahe could not have been in competition with either West-Lite or Regency for PRA sales because Von Der Ahe purchased his lamps from Sylvania only after he had a customer's order in hand. According to Sylvania's theory, if Von Der Ahe purchased a lamp from Sylvania after he had already "sold" that lamp to a customer, then Von Der Ahe could not be in competition for the resale of that particular lamp. Sylvania also reasons that if Von Der Ahe did not have a customer bid, than he would have no reason to purchase a lamp from Sylvania, and there could be no "contemporaneous" sale. Sylvania's theory is unconvincing. Whether or not Von Der Ahe actually purchased his inventory before or after he made customer

sales does not change the fact that he competed with West-Lite and Regency for each sale on the basis of the price he expected to get from Sylvania. Moreover, the evidence shows that discrimination in PRA prices always occurred after customer sales had been made anyway, because West-Lite and Regency received their discriminatory "claimbacks" only after they had sold lamps to customers. RT 2552-53. This evidence is sufficient to satisfy the Robinson-Patman Act's requirement that discriminatory sales be "substantially contemporaneous." *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1191 (9th Cir. 1984).

Finally, Sylvania argues that Von Der Ahe failed to prove competitive injury, either through a showing that Sylvania maintained a substantial price difference over time, or through evidence that Von Der Ahe lost sales or profits due to Sylvania's discriminatory prices. *See Falls City Ind., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 (1983). We disagree. Rostvold testified that the CNAs, PRAs, and other pricing documents for Regency and West-Lite showed that Sylvania offered Regency and West-Lite prices that were three to five percent lower than the prices offered to Von Der Ahe for the entire four years that Von Der Ahe was in bushiness. RT 1518-19, 1541, 1569-71. Moreover, as noted above, Rostvold testified that as little as a 2% difference in price will cause a customer to choose one lamp distributor over another. RT 1532-33. In addition, Von Der Ahe presented 15 specific examples of lost sales and profits, in conjunction with testimony from several customers stating that they switched to West-Lite or Regency because of the price difference or would have switched if Von Der Ahe had not lowered his prices to meet the competition. RT 1730-31, 2151-52, 2155-56. Sylvania also admits that Von Der Ahe lost sales involving Coldwell Banker. Appellant's Br. at 17.[3]

---

[3]Sylvania also argues that to establish competitive injury, Von Der Ahe had to prove that Sylvania's reduced prices to Regency

In sum, the record contains enough evidence to support the jury verdict of competitive injury.[4]

---

and West-Lite led to a reduction in their resale prices. Von Der Ahe argues that an effect on retail pricing is not necessary to show competitive injury because other factors such as low profit margin may provide a favored purchaser with a significant competitive advantage. We note that although the Supreme Court once said that a Robinson-Patman plaintiff's claim was "particularly weak" where he was unable to show that favored retailers lowered their retail prices, the Court specifically reserved the question of whether "such a failure as a matter of law demonstrates no competitive injury." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564-65 n.4 (1981). However we decline to answer this question at this time because we believe that Von Der Ahe did present evidence from which a jury could infer that Sylvania's discriminatory practices influenced resale prices. Von Der Ahe presented testimony from former Regency salespeople stating that it was common to go below suggested retail to compete with other Sylvania distributors, and that "if [competition] was against another Sylvania distributor, nobody had better prices than [Regency] did." RT 4794-96, 4851-56, 4876-77, 4880-81.

[4] Sylvania also argues that Rostvold was not qualified to give expert testimony regarding competitive injury because (1) Rostvold had no antitrust experience, (2) his opinion was formed solely on the basis of discussions with Von Der Ahe and Von Der Ahe's accountant and attorneys, and (3) his opinion was premised on an implausible theory, namely that Sylvania was seeking to increase the market share of large distributors because large distributors are easier to control. First, Rostvold holds a doctorate in economics from Stanford, and therefore meets the liberal standards for qualification as an expert witness established by Fed. R. Evid. 702. Second, the source of Rostvold's data goes only to the weight of his testimony, not to admissibility, for it is the expert's reasoning or methodology, not the source of his data, that qualifies him as an expert. Third, while Rostvold's theory about large distributors being easier to control may qualify as an

Antitrust Damages

Sylvania argues that Von Der Ahe failed to prove the amount of antitrust damages with sufficient specificity because he did not present evidence of the actual effect of alleged discriminatory sales "transaction by transaction." Appellant's Br. at 25. However, in an antitrust action, a plaintiff must establish only a "just and reasonable" basis for estimating the amount of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Furthermore, a finder of fact is permitted "to act upon probable and inferential, as well as direct and positive proof" in calculating antitrust damages. *Id.* (quoting *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 561-4 (1931)). Sylvania's "transaction by transaction" method for proof of damages is contrary to this relaxed standard.

Sylvania also argues that even under a relaxed standard, Von Der Ahe failed to prove the amount of damages because his five damage studies should have been excluded from evidence. Sylvania's numerous criticisms of Von Der Ahe's and Rostvold's damage studies, however, go only to their weight. For instance, Sylvania claims that the lost profits study prepared by Rostvold "relied solely on estimates for four essential factors used to calculate lost profits each year." Appellant's Br. at 33. Sylvania also criticizes Von Der Ahe's A and B studies as "unreliable." Appellant's Reply Br. at 8. Since it is the province of the jury to assess weight and credibility, we cannot reverse the jury's determination as to damages as a matter of law.

---

implausible theory, Sylvania does not point to actual testimony by Rostvold premised on this theory. Therefore, we hold that the district court did not abuse its discretion, *United States v. Rahm*, 993 F.2d 1405, 1409-10 (9th Cir. 1993), in admitting Rostvold's testimony regarding competitive injury.

Finally, Sylvania claims that the district court abused its discretion in permitting Von Der Ahe to testify regarding damages because Von Der Ahe was not qualified to be either a lay or expert witness. We believe, however, that Von Der Ahe met the liberal standards for qualifying as an expert on the subject of his business' lost profits or sales because he was the owner and manager of his business. *Cf. Teen-Ed. Inc. v. Kimball Int'l. Inc.*, 620 F.2d 399, 403 (3d Cir. 1990) (accountant of business not required to qualify as expert to testify regarding lost profits or sales or to project future profits).

In sum, Von Der Ahe presented sufficient evidence to establish the amount of damages.

Meeting Competition Defense

Sylvania claims that it proved, as a matter of law, that it lowered its prices "in good faith to meet an equally low price of a competitor." 15 U.S.C. § 13(b). Specifically, Sylvania argues that it offered discriminatory prices to Regency and West-Lite in response to "a price war started by Philips." Appellant's Br. at 43. Von Der Ahe argues that ample evidence supports the jury's decision that Sylvania did not act in good faith when it lowered prices to Von Der Ahe's competitors. We agree with Von Der Ahe.

The record contains evidence to support the jury's finding that Sylvania was not acting in good faith when it offered discriminatory prices to Regency and West-Lite. There is evidence that Competitive Activity Reports ("CRAs") — a key component of the documentation corroborating the discounts Sylvania was supposedly meeting — were falsified by Sylvania employees, RT 2793-96, 3559-65, 3576-77,

5578-9.[5] A Sylvania employee testified that most price exceptions were approved without verification. RT 5580. Regency's president also conceded that certain rebates were not made in response to competition from Philips. RT 3559. Because a jury could reasonably find from this evidence that Sylvania's lower prices to Regency and West-Lite were not the result of a good-faith effort to meet the prices offered by other manufacturers, we decline to hold that Sylvania established the meeting competition defense as a matter of law.

Jury Instruction on Meeting Competition Defense

Sylvania argues that the jury instruction on the meeting competition defense was erroneous because it permitted the jury to consider whether Sylvania could have pursued "alternative courses of action" in responding to the gray market other than by lowering prices to Von Der Ahe's competitors. Sylvania claims that this instruction was erroneous because (1) it added a new factor to those identified by *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978), as relevant to the good faith analysis; and (2) there is no policy reason for adding this factor since sellers need no additional incentive to find ways to stamp out gray markets. Whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed *de novo*. *Caballero v. Concord*, 956 F.2d 204, 205 (9th Cir. 1992).

Neither of Sylvania's arguments is persuasive. As Von Der Ahe argues, *Gypsum* makes clear that the list of factors it sets out for evaluating an asserted meeting competition defense is not exclusive. 438 U.S. at 454-55 ("Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in

[5]At the hearing on the post-trial motions, Judge Keller described the credibility of the CRAs as "extraordinarily suspect." Tr. of Proc. (Mar. 15, 1994) 33.

appraising a seller's good faith in matching a competing offer."). Moreover, consideration of a seller's ability to address a competitive challenge by means other than price-cutting is thoroughly appropriate in evaluating the seller's good faith. "The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Falls City*, 460 U.S. at 441. Since the availability of other courses of action affects whether or not there is a situation of competitive necessity, it is relevant to the good faith inquiry. Thus, the district court's "alternate courses of action" instruction was not erroneous.

STATE LAW ISSUES

Sylvania argues that Von Der Ahe's claim of breach of the implied covenant of good faith should be barred as a matter of California law because the Distributorship Agreement between Sylvania and Von Der Ahe contained no provisions regarding the prices Sylvania would charge to competing distributors. Von Der Ahe responds generally that Sylvania's discriminatory pricing deprived him of the benefits of the contract, and therefore breached an implied covenant that is read into every contract. We agree with Sylvania.

Under California law[6], the implied covenant of good faith protects only the express promises of the contract. *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 14 Cal.Rptr.2d 335, 339 (Cal. Ct. App. 1992) ("If there

---

[6] California law apparently governs the Distributorship Agreement. Although Paragraph 12 of the Agreement states that Massachusetts law governs, a district court order filed on May 17, 1993, dictates that Massachusetts law will not apply to any claims or issues at trial. CR 185. Both Sylvania and Von Der Ahe seem to assume that California law applies.

exists a contractual relationship between the parties . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract."); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988) ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.") The Distributorship Agreement between Sylvania and Von Der Ahe provided only that Sylvania would sell lighting products to Von Der Ahe and that Von Der Ahe would promote the sale of Sylvania's lamps. Sylvania did not promise to provide Von Der Ahe with the lowest prices of any distributor, nor did it promise to treat all distributors equally. Thus, Sylvania's price discrimination did not violate or in any way relate to the express provisions of the Distributorship Agreement and therefore could not constitute a violation of the implied covenant of good faith. Von Der Ahe's interpretation of the Distributorship Agreement would imply an additional obligation of Sylvania — the obligation not to price discriminate — and is thus inconsistent with settled California law. *See Racine & Laramie*, 14 Cal.Rptr.2d at 339.

CONCLUSION

The judgment is AFFIRMED, except that to the extent, if any, the judgment rests on the claim of breach of the implied covenant of good faith and fair dealing under state law, it is REVERSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING,
a California Corporation; and
CHARLES T. VON DER AHE,
Plaintiffs,

vs.

GTE PRODUCTS CORPORATION,
a Delaware Corporation;
SYLVANIA LIGHTING SERVICES, CORPORATION,
a Delaware Corporation;
and DOES 1-100,
Defendants.

Filed May 18, 1994
Clerk U.S. District Court
Central District of California
By Deputy
Case No. CV 91-6424 WDK (Shx)

AMENDED JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and a judgment was entered herein on January 13, 1994. Based on the post judgment motions filed by Defendant Osram Sylvania, Inc. ("Sylvania"), the judgment is amended as follows:

It is Ordered and Adjudged:

(1) for the Robinson-Patman claim,

(a) that plaintiff Chroma Lighting ("Chroma") recover from Sylvania actual damages of $125,000 in lost past profits, trebled to $375,000, with interest thereon after

January 13, 1994, as provided by law, and its attorneys' fees and costs of action to be determined by the Court;

(b) that plaintiff Charles T. Von Der Ahe ("Von Der Ahe") recover from Sylvania actual damages of $450,000 in lost past profits, trebled to $1,350,000, with interest thereon after January 13, 1994, as provided by law, and his attorneys' fees and costs of action to be determined by the Court;

(c) that plaintiffs together recover from Sylvania actual damages of $600,000 total in lost going concern value, trebled to $1,800,000, with interest thereon after January 13, 1994, as provided by law;

(2) alternatively, for the Breach of Covenant of Good Faith and Fair Dealing claim,

(a) that plaintiff Chroma recover from Sylvania actual damages of $125,000 in lost past profits, with interest thereon after January 13, 1994, as provided by law, and its costs of action;

(b) that plaintiff Von Der Ahe recover from Sylvania actual damages of $450,000 in lost past profits, with interest thereon after January 13, 1994, as provided by law, and his costs of action;

(c) that plaintiffs together recover from Sylvania actual damages of $600,000 total in lost going concern value, with interest thereon after January 13, 1994, as provided by law;

Dated: 5-18-94

WILLIAM D. KELLER

Honorable WILLIAM D. KELLER
United States District Judge

LES J. WEINSTEIN
MARTIN J. TRUPIANO
WILLIAM J. JAMES
GRAHAM & JAMES
801 South Figueroa Street, 14th Floor
Los Angeles, CA 90017-5554
Telephone: (213) 624-2500
Attorneys for Defendant
OSRAM SYLVANIA, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING, a California Corporation; and CHARLES T. VON DER AHE,
Plaintiffs,
vs.
GTE PRODUCTS CORPORATION, a Delaware Corporation; SYLVANIA LIGHTING SERVICES, CORPORATION, a Delaware Corporation; and DOES 1-100
Defendants.

Filed May 27, 1994
Case No. CV 91-6424 WDK (Shx)

Order Modifying and Directing Final Entry of Judgment, Denying and Granting Sylvania's Post-Trial Motions, and Staying Enforcement and New Trial on Punitive Damages.

The jury has returned a verdict in favor of Plaintiffs on their Robinson-Patman Act claims and contract claims, and the Court has announced its rulings denying the motions of Defendant Osram Sylvania, Inc. ("Sylvania") for judgment as a matter of law under Rule 50, F.R.C.P., and for a new trial under Rule 59, F.R.C.P., as to each of these counts.

The Court has announced its ruling partially granting Sylvania's motion for a new trial on the plaintiff's state law tort claims, granting a new trial with respect to the punitive damages issues unless Plaintiffs accept a remittitur thereon and Plaintiffs have filed a notice rejecting such remittitur.

The Court finds under Rule 54(b), F.R.C.P, that there is no just reason for delay of the entry of judgment on the Plaintiffs' Robinson-Patman Act and contract claims. Resolution of the issues pertaining thereto will have no direct effect on the judgment to be entered on the Robinson-Patman Act and contract claims. Sylvania has indicated its intent to file an appeal from such judgment and there is not reason to postpone the commencement of such review.

On the other hand, an appeal of the issues raised in connection with the Plaintiffs' Robinson-Patman and contract claims may affect resolution of the state law tort claim and/or the scope of the new trial ordered. A prompt appeal of such issues could aid in the expeditious resolution of the case, minimize the risk of multiple retrials, and permit the Court to modify its new trial order, if appropriate, based on the rulings of the Circuit Court, thereby promoting judicial economy and conserving the resources of the parties.

Based on the above facts and rulings, on the notice filed by the Plaintiffs rejecting the remittitur, and on the stipulation filed herein by the parties agreeing that entry of judgment on the Robinson-Patman Act and contract claims under Rule 54(b) is appropriate,

IT IS HEREBY ORDERED that

1. The judgment entered in this case on January 13, 1994 is hereby modified to delete paragraph (3) thereof, and the Clerk of the Court is directed to enter such amended judgment as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure;

2. Enforcement of the amended judgment against Sylvania shall be stayed during the appeal thereon on condition that Sylvania give a supersedeas bond in an amount equal to 115% of the amount of the amended judgment, including attorney's fees, such bond to be given within ten days of the entry of the final order on Plaintiffs' motion for attorney's fees;

3. Sylvania's motions for judgment as a matter of law and/or a new trial as to the judgment, as amended, are hereby denied; and

4. Sylvania's motion for a new trial on Plaintiffs' state law tort claim is hereby denied as to the liability and compensatory damage issues, but granted as to the punitive damages issues, but such new trial shall be stayed pending resolution of Sylvania's appeal of the amended judgment and shall remain subject to possible modification based on the rulings of the Circuit Court of Appeals, or as justice may require.

Dated: 5-27-94.

WILLIAM D. KELLER

Honorable WILLIAM D. KELLER
United States District Judge

APPROVED AS TO FORM:

GRAHAM & JAMES

By: WILLIAM J. JAMES
WILLIAM J. JAMES
Attorneys for Defendant
Osram Sylvania, Inc.

GRANT & LAUBSCHER

By: DEEANN M. TAYLOR
DEEANN M. TAYLOR
Attorneys for Plaintiffs
Chroma Lighting and
Charles T. Von Der Ahe

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING,
CHARLES T. VON DER AHE,
Plaintiffs,

VS.

GTE PRODUCTS CORPORATION,
SYLVANIA LIGHTING SERVICES,
CORP.,
Defendants.

FILED
JAN. 12, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Case No. CV 91-6424 WDK

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjusted:

(1) for the Robinson-Patman Act claim,

(a) that plaintiff Chroma recover actual damages of $125,000 in lost past profits, trebled to $375,000, with interest thereon as provided by law, and its attorneys' fees and costs of action to be determined by the court;

(b) that plaintiff Von Der Ahe recover actual damages of $450,000 in lost past profits, trebled to $1,350,000, with thereon as provided by law;

(d) that plaintiff Chroma recover punitive damages of $1,800,000, with interest thereon as provided by law;

(e) that plaintiff Von Der Ahe recover punitive damages of $4,000,000, with interest thereon as provided by law;

Dated at Los Angeles, California, this 12th day of January 1994.

WILLIAM D. KELLER

Honorable William D. Keller

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California corporation;
and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,

vs.

GTE PRODUCTS CORPORATION,
a Delaware corporation, et al.,
Defendants

and

SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware corporation,
Defendant-Appellant.

Filed
May 22, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 94-55581
D.C. No. CV-91-6424-WDK

ORDER

Before: BROWNING, NORRIS, and REINHARDT, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Browning and Reinhardt have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

PETITIONER'S LIST OF ALL PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF GTE PRODUCTS OF CONNECTICUT CORPORATION

GTE Products is a former wholly-owned subsidiary of GTE Products of Connecticut Corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation. GTE Corporation has issued shares to the public. The following are subsidiaries of GTE Corporation that may have issued shares to the public:

GTE California Incorporated
The Micronesian Telecommunications Corporation
VenWorld Telecom, C.A.
Anglo-Canadian Telephone Company
BC TELECOM Inc.
Pachena Industries Ltd.
Pacific Place Communications Ltd.
ISM Information Systems Management (B.C.) Corporation
Quebec-Telephone
GTE Directories (B) SDN.BHD.
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Burlington Cellular, Inc.
AG Communication Systems Corporation
Companie Anonima Nacional Telefonos de Venezuela (CANTV)
2770695 Canada Inc.
Prism Systems Inc.
Chesapeake Directory Sales Company
GTE Directories Lanka (PVT.) LTD.
Radiowealth, Inc.
Contel of California, Inc.

MOTION FILED

SEP 18 1997

(2)

No. 97-307

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS, INC.,
Petitioner,
v.
CHARLES D. VON DER AHE and
CHROMA LIGHTING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GROCERY MANUFACTURERS OF AMERICA, INC. IN SUPPORT OF THE PETITION

Of Counsel:
JAMES H. SKILES
Vice President and
General Counsel
GROCERY MANUFACTURERS
OF AMERICA, INC.
1010 Wisconsin Avenue, N.W.
Suite 900
Washington, D.C. 20007

TERRY CALVANI
Counsel of Record
MICHAEL A. CONLEY
PILLSBURY MADISON &
SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorneys for Amicus Curiae
Grocery Manufacturers
of America, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-307

OSRAM SYLVANIA PRODUCTS, INC.,
Petitioner,

v.

CHARLES D. VON DER AHE and
CHROMA LIGHTING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, Grocery Manufacturers of America, Inc. ("GMA") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition filed by Osram Sylvania Products, Inc. Petitioner has consented to the filing of this brief. Respondent has not consented to the filing of this brief.

GMA is a non-profit voluntary business association that represents more than 130 companies that manufacture and distribute products primarily sold in retail grocery stores throughout the United States. GMA's member companies have annual sales of more than $400 billion.

GMA and its members have had a longstanding, keen interest in matters relating to the sale and distribution of

products sold in retail grocery stores in the United States. This includes the interpretation and enforcement of the federal antitrust laws, and especially the Robinson-Patman Act. The Robinson-Patman Act was enacted in 1936 at the behest of a wholesale grocers' association to address alleged pricing abuses in the grocery manufacturing industry.[1] Since the Act's adoption, numerous cases have been brought that involve this industry. Indeed, the grocery manufacturing industry can be viewed as the Act's "test tube"; many of this Court's Robinson-Patman Act opinions involve grocery products.[2]

GMA believes that vigorous price (and non-price) competition should be encouraged in an environment where the rules regulating such competition are clear, predictable, and rational. This is particularly true in an industry like the grocery industry, in which there are list prices which are affected by rebates, coupons, volume discounts, shelf payments, etc. This makes pricing decisions complicated, but critical to the competitiveness of the industry. To expose these countless pricing and competitive decisions—which substantially enhance competition—to treble damage liability would have a severe chilling effect on the very price-cutting decisions that lie at the heart of the competitive process.

GMA is concerned that the Ninth Circuit's decision will not only encourage Robinson-Patman Act treble damage litigation, but will create a great deal of uncertainty with respect to pricing decisions in industries, such as grocery manufacturing, where volume discounts and rebates are

---

[1] *See generally In re General Motors Corp.*, 103 F.T.C 641, 691 (1984). *See also* F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11-23 (1962).

[2] *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *United States v. Borden*, 370 U.S. 460 (1962); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

prevalent. This can serve only to dampen competition severely, which ultimately results in increased costs to consumers for basic needs.

For the foregoing reasons, GMA respectfully requests that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

TERRY CALVANI
Counsel of Record
MICHAEL A. CONLEY
PILLSBURY MADISON & SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorneys for Amicus Curiae Grocery Manufacturers of America, Inc.

Of Counsel:
JAMES H. SKILES
Vice President and General Counsel
GROCERY MANUFACTURERS OF AMERICA, INC.
1010 Wisconsin Avenue, N.W.
Suite 900
Washington, D.C. 20007

September 18, 1997

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
REASONS FOR GRANTING THE PETITION	2
I. THE CIRCUIT SPLIT IS CLEAR AND WILL NOT RESOLVE ITSELF	3
II. THIS COURT'S RECENT DECISIONS HAVE NOT ELIMINATED EXISTING CONFUSION ON THIS ISSUE	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases Page

Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 2, 4

Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676 (10th Cir. 1984) 2, 4

Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988) 2, 3

Coastal Fuels v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996) 2, 6

H.L. Hayden v. Siemens Medical Sys., 879 F.2d 1005 (2d Cir. 1989) 2, 4

J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) 2

Richard Short Oil Co., Inc. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 2, 4

Other Authorities

Herbert Hovencamp, Federal Antitrust Policy: The Law of Competition and Its Practice (1994) 6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-307

OSRAM SYLVANIA PRODUCTS, INC.,
Petitioner,
v.
CHARLES D. VON DER AHE and
CHROMA LIGHTING,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF GROCERY MANUFACTURERS OF AMERICA, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

GMA's interest in the issue presented by the petition is substantial and direct for the reasons set forth in the foregoing motion for leave to file this brief. In sum, GMA's member companies are responsible for 90 percent of all food and consumer packaged goods sold in the United States.* Those companies need to know with certainty whether their competitively driven pricing decisions will pass muster under governing law. Because the law governing claims under the Robinson-Patman Act differs from circuit to circuit, GMA's members lack that cer-

* Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

tainty. Moreover, in light of the Ninth Circuit decision at issue here, GMA's members face an increased risk of antitrust suits seeking treble damages based on conduct that is pro-competitive and indisputably benefits overall consumer welfare.

REASONS FOR GRANTING THE PETITION

The petition offers a classic case for this Court's intervention. The Courts of Appeals are clearly divided on the important antitrust issue presented. The Ninth and Third Circuits have held that in a Robinson-Patman Act case charging a defendant with offering the same product to different buyers at different prices (a "secondary-line" price discrimination case), the presumption of harm to competition established by proof of injury to an individual competitor [1] *cannot* be overcome by proof of no actual harm to competition.[2] The D.C. Circuit has held that the presumption *can* be rebutted, and the First, Second, Eighth and Tenth Circuits have likewise suggested in dictum that proof of no actual harm to competition would defeat a secondary-line claim.[3] There is no ostensible benefit to allowing this issue to "percolate" any longer in the lower courts: the split in authority is established and unlikely to resolve itself.

In addition to satisfying this traditional criterion for certworthiness, this case offers the Court a good vehicle for resolving the antitrust issue presented in the petition:

---

[1] *FTC v. Morton Salt*, 334 U.S. 37, 50-51 (1948).

[2] Pet. App. at 13a; *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991). The Eleventh Circuit has suggested that it would follow the same approach. *See Alan's of Atlanta v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

[3] *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988); *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 193-94 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996); *H.L. Hayden v. Siemens Medical Sys.*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989); *Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984).

the issue was clearly raised and adjudicated at the trial and appellate levels, both sides of the issue will be ably briefed, and there are no procedural impediments to reaching and deciding the issue presented.

In short, this split in authority is one which the Court needs to resolve, and it should do so in this case.

I. THE CIRCUIT SPLIT IS CLEAR AND WILL NOT RESOLVE ITSELF.

The Ninth Circuit panel that decided this case candidly acknowledged the split in authority that the petition is asking this Court to resolve:

> The question presented by Sylvania's appeal is whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy. The question was left open by *Morton Salt*, and the circuits are divided on the issue.

Pet. App. 4a-5a.

Siding with the Third Circuit, the court below ruled unambiguously that "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." Pet. App. 13a. The panel explicitly acknowledged and rejected the D.C. Circuit's directly contrary conclusion:

> In *Boise*, the D.C. Circuit held that the language of the Robinson-Patman Act, which prohibits price discriminations that tend to "injure, destroy, or prevent competition," indicates that Congress was concerned about the preservation of competition, and not the protection of individual competitors. . . . Asserting that harm to competiiton is "the name of the Robinson-Patman game," [837 F.2d] at 1143, the D.C. Circuit reasoned that it would "def[y] both logic and the import of *Morton Salt*" to hold that

> an inference of competitive injury derived from evidence of harm to individual competitors may not be overcome when there is no actual harm to competition. *Id.* at 1144.
>
> * * * *
>
> We agree with . . . the Third Circuit. We are persuaded that the language that the Robinson-Patman Act added to § 2(a) of the Clayton Act—"to injure, destroy, or prevent competition"—expresses Congressional intent to protect individual competitors, not just market-competition, from the effects of price discrimination.

Pet. App. 6a, 9a.

The foregoing excerpt reveals that the critical question underlying the issue presented in this case is whether, in the context of secondary-line price discrimination claims, the Robinson-Patman Act is intended to protect individual competitors (as the Ninth and Third Circuits have held) or competition (as the D.C. Circuit has held). Thus, although several circuits have not ruled on the *precise* question presented here, those courts' statements regarding the competitor-versus-competition focus of the Robinson-Patman Act are highly predictive of how those same courts would rule on the issue presented in the petition.[4]

---

[4] The Eleventh Circuit shares the Third and Ninth Circuits' view that, in secondary-line cases, the Robinson-Patman Act is intended to protect individual competitors instead of competition. *See Alan's of Atlanta*, 903 F.2d at 1418 n.6 ("[I]njury to competition is proved by showing an injury to competitors"). The Second, Eighth and Tenth Circuits share the D.C. Circuit's position that, in secondary-line cases, the Act is intended to protect competition rather than individual competitors. *See, e.g., H.L. Hayden*, 879 F.2d at 1021 n.12 ("[V]iolation of 15 U.S.C. § 13(a) requires not only proof of price discrimination, but a potential impact substantially to lessen competition or create a monopoly in any line of commerce"); *Richard Short Oil Co., Inc.*, 799 F.2d at 420 ("[A]nalysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses"); *Black*

There is, therefore, no good reason for the Court to await further consideration of this issue by the lower courts.

II. THIS COURT'S RECENT DECISIONS HAVE NOT ELIMINATED EXISTING CONFUSION ON THIS ISSUE.

This Court's most recent Robinson-Patman Act decisions suggest strongly that the D.C. Circuit is right and the Ninth Circuit and Third Circuit are wrong. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), for example, this Court held that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition," *id.* at 220, and "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.' " *Id.* at 224 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in *Brooke Group*). Although *Brooke Group* concerned a primary-line Robinson-Patman Act claim (*i.e.*, one alleging that the defendant offered price discounts in order to take business from direct competitors of the defendant), this Court did not limit the foregoing statements to primary-line claims. As such, it is difficult to square the panel's statement in this case that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general" (Pet. App. 5a) with the language from *Brooke Group* set out above.

Nonetheless, the court below determined that the Court's reasoning in *Brooke Group* does not apply to the secondary-line price discrimination claim at issue here. Pet. App. at 12a ("We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims."). The Third Circuit has likewise adhered to its view that a secondary-line price discrimination claim prop-

---

Gold, Ltd., 729 F.2d at 680 ("The primary purpose of the Act is to protect the competitive process, not individual competitors").

erly focuses on injury to competitors without regard to injury to competition—even following this Court's decision in *Brooke Group*. *See Stelwagon Mfg. Co. v. Tarmac Roofing*, 63 F.3d 1267, 1272-73 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996).

These decisions demonstrate that this Court's existing body of Robinson-Patman Act jurisprudence is not sufficiently clear to eliminate the division in circuit authority on the question presented in the petition. This Court should therefore accede to the requests of courts and legal scholars and clarify whether secondary-line price discrimination claims—like all other claims under the antitrust laws—fail in the face of proof that the challenged conduct has not harmed competition.[5]

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

TERRY CALVANI
Counsel of Record
MICHAEL A. CONLEY
PILLSBURY MADISON & SUTRO LLP
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 861-3000
Attorneys for Amicus Curiae Grocery Manufacturers of America, Inc.

Of Counsel:
JAMES H. SKILES
Vice President and General Counsel
GROCERY MANUFACTURERS OF AMERICA, INC.
1010 Wisconsin Avenue, N.W.
Suite 900
Washington, D.C. 20007

---

[5] *See, e.g., Coastal Fuels*, 79 F.3d at 193 (indicating the need for further guidance from this Court regarding post-*Brooke Group* treatment of secondary-line claims); Herbert Hovencamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (1994) § 14.6a (stating that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue").

MOTION FILED
SEP 16 1997

No. 97-307 (3)

FILED
SEP 18 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,

Petitioner,

v.

CHARLES T. VON DER AHE AND CHROMA LIGHTING,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

MOTION OF HEWLETT-PACKARD COMPANY AND COMPAQ COMPUTER CORPORATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICI CURIAE*

Of Counsel:
GILAD OHANA
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, California 94304

SCOTT HOING
COMPAQ COMPUTER CORPORATION
P.O. Box 692000
Houston, Texas 77269

JOHN F. COONEY
Counsel of Record
WILLIAM D. COSTON
MELISSA LANDAU STEINMAN
VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Attorneys for Amici Curiae Hewlett-Packard Company and Compaq Computer Corporation

September 18, 1997

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

28 pp

No. 97-307

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,

Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF HEWLETT-PACKARD COMPANY AND COMPAQ COMPUTER CORPORATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Hewlett-Packard Company ("H-P") and Compaq Computer Corporation ("Compaq") respectfully move for leave to file the attached Brief *amici curiae* in support of the Petition for a Writ of Certiorari. The consent of Petitioner was obtained, and is on file with the Clerk. The consent of Respondent was requested but refused.

The interest of H-P and Compaq in this case arises from their position as leading manufacturers in the dynamic computer industry. Both manufacturers distribute information technology products through complex distribution mechanisms, in competition with other personal computer ("PC") makers with similar distribution mechanisms and with direct-selling manufacturers.

The Brief which *amici curiae* request permission to file will contain a more complete description of the importance of the decision of the Ninth Circuit for the personal computer industry. The intense price competition, complex and varied distributional structures (including direct electronic sales to end users), and rapid technological innovation which are characteristic of the PC industry will magnify the adverse consequences of the Ninth Circuit's decision. Further, the conflict among the courts of appeals on the legal issue of whether an inference of injury to competition may be rebutted by evidence of healthy competition in the relevant market creates intolerable uncertainty for companies, like *amici*, that operate nationwide distribution systems.

On the merits, the Brief that H-P and Compaq request permission to file sets forth additional legal arguments, not suggested by the Petitioner. The Brief argues that the Ninth Circuit's holding, that an inference of injury to competition may not be rebutted by actual evidence of healthy interbrand competition, misconstrues the law and retards innovative distribution methods. By exposing manufacturers to

increased litigation risk for price concessions to distributors, the decision threatens to rigidify price structures and thereby to prevent price reductions beneficial to consumers that increase access to key technology. The Petition raises an important legal question that warrants review by the Court at this time.

Respectfully submitted,

Of Counsel:
Gilad Ohana
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, California 94304

Scott Hoing
COMPAQ COMPUTER CORPORATION
P.O. Box 692000
Houston, Texas 77269

September 18, 1997

John F. Cooney
Counsel of Record
William D. Coston
Melissa Landau Steinman
VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Attorneys for Amici Curiae Hewlett-Packard Company and Compaq Computer Corporation

No. 97-307

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,

Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HEWLETT-PACKARD COMPANY AND COMPAQ COMPUTER CORPORATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 2

I. THE NINTH CIRCUIT'S DECISION THREATENS SUBSTANTIAL HARM TO PERSONAL COMPUTER MAKERS 4

II. THE NINTH CIRCUIT MISCONSTRUED SECTION 2(a) IN BARRING USE OF EVIDENCE OF COMPETITION TO REBUT THE INFERENCE OF INJURY TO COMPETITION 9

A. The Text Of The Robinson-Patman Act Permits The Defendant To Introduce Evidence Of Absence Of Injury To Competition 11

B. The Ninth Circuit's Application Of Section 2(a) To Secondary-Line Competition Is Inconsistent With This Court's Application Of This Provision To Primary-Line Competition 16

C. The Court Should Determine Whether Section 2(a), In Secondary-Line Cases, Is To Be Interpreted Consistently With The Other Antitrust Laws 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (1990), *reh'g denied*, 920 F.2d 704 (11th Cir. 1991) 3
Alexander v. Texas Co., 165 F. Supp. 53 (W.D. La. 1958) 12
Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) 11
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 11, 19, 20
Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953) 19
Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988) 13
Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) 11
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 19
Comcoa, Inc. v. NEC Tel., Inc., 931 F.2d 655 (10th Cir. 1991) 13
Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945) 10
Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1982) 10
FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 9, 10, 12
FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959) 15
FTC v. Morton Salt Co., 334 U.S. 37 (1948) ..... *passim*
Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979) 18

Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1976) 13
Henry v. Chloride, Inc., 809 F.2d 1334 (8th Cir. 1987).... 11
J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 12, 19
J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) 3
Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952) 13
National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1983). 11
Standard Oil Co. v. Trade Comm'n, 330 U.S. 231 (1951) 19
Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990) 12
Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964) 13
United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) 18

STATUTES

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) ..... *passim*
Section 2(b), 15 U.S.C. § 13(b) 19
Section 2(d), 15 U.S.C. § 13(d) 15
Section 2(e), 15 U.S.C. § 13(e) 15

OTHER AUTHORITIES

HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION & ITS PRACTICE (1994) 8, 18
EARL W. KINTNER, FEDERAL ANTITRUST LAW (1983) .. 7, 8

Paul LaRue, *The Robinson-Patman Act in the Twenty-First Century: Will The Morton Salt Rule Be Retired?* 48 SMU L. Rev. 1917 (1995) 18
F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962) ..... *passim*
U.S. Department of Justice, *Report on the Robinson-Patman Act* (1977) 7, 8
JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS & TRADE REGULATION (2d ed. 1997) 17

INTERESTS OF *AMICI CURIAE*[1]

Hewlett-Packard Company ("H-P") and Compaq Computer Corporation ("Compaq") submit this Brief *amici curiae* in support of the Petition for a Writ of Certiorari. The Court should grant review because the Ninth Circuit's decision adversely affects all product vendors, including personal computer ("PC") manufacturers. The Ninth Circuit held that, under Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)), an inference of injury to competition, arising out of mere proof of higher prices to the plaintiff, may not be rebutted by actual evidence of healthy interbrand competition in the favored purchaser's market. That decision misconstrues the statute and will deter innovation in product distribution.

H-P and Compaq are leading manufacturers of PCs, a dynamic industry driving the United States economy. They sell PCs and other information technology products through various distribution mechanisms, including a traditional three-tier system (manufacturer, distributor, reseller/retailer); a two-tier system (manufacturer-reseller); and, to a limited degree, by direct sales to end-users. They compete with other PC makers which operate similar distribution systems and also with manufacturers which sell directly to end-users via telephone, mail order and the Internet. Some of their competitors communicate prices directly and instantaneously to interested buyers through their Internet web-sites. H-P and Compaq also compete with low cost assemblers, known as "screwdriver shops," which produce PCs by combining commercially available parts. The PC market is highly competitive at the manufacturer and distributor levels, and is

---

[1] No counsel for any party had any role in authoring this Brief, and no person other than the named *amici* made any monetary contribution to its preparation or submission.

characterized by constant technological innovation. Every day, functionality increases as prices fall in this evolutionary industry.

In managing their distribution networks, H-P and Compaq devote substantial attention to Robinson-Patman compliance issues and incur significant counseling costs. They are adversely affected by the court of appeals' decision, because it materially increases exposure to Robinson-Patman claims and exacerbates the conflict among the Circuits. By holding that an inference of injury to *competition*, arising out of an alleged injury to an individual *competitor*, may not be rebutted by evidence that competition was unaffected, the decision below will particularly affect companies like H-P and Compaq, which operate through multiple distribution mechanisms.

REASONS FOR GRANTING THE PETITION

Under the Ninth Circuit's holding, a plaintiff which proves that it paid a higher price than a competing distributor obtains a conclusive presumption that the "injury to competition" element of Section 2(a) has been satisfied. The question whether this inference may be rebutted with a showing that competition in the relevant market has not in fact been harmed is a recurring legal issue of great practical significance to manufacturers and resellers alike. This question warrants review by the Court.

There is a square conflict among the courts of appeals as to whether a seller may rebut a buyer's *prima facie* showing of injury to competition, based on an inference drawn from nothing more than the buyer's receipt of a less favorable price than another distributor, with evidence that competition in the relevant (buyer-level) market nonetheless

remains vibrant.[2] The issue is directly presented in this case, and there are no complicating issues, unique to this litigation, that might make it appropriate to await another case in order to resolve the conflict.

The conflict and resulting confusion in this area of law inhibit innovation by PC manufacturers in the design and management of their nationwide distribution systems. This confusion will result in significant additional counseling and compliance costs and will expose PC makers to substantial litigation risk. While manufacturers in other industries will be similarly affected, the impact will be particularly serious in the PC industry, which is marked by intense competition, rapid technological change, and direct electronic sales to end-users, all of which present manufacturers with frequent demands by distributors for price concessions.

On the merits, there are compelling reasons why the Court should grant review. First, the Ninth Circuit's decision ignored the literal language of Section 2(a) in several respects. While the language of Robinson-Patman invites fact finding on the element of injury to competition, the decision essentially eliminates this element of the offense. This result is contrary to prior decisions of this Court, which establish that the inference of harm to competition in a secondary-line Robinson-Patman case may be rebutted. Second, the decision is inconsistent with the Court's interpretation of Section 2(a) in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Finally, the decision interprets Section 2(a) in a manner inconsistent with the rest of the antitrust laws, by focusing on the harm to one *competitor,* rather than injury to

---

[2] *Accord J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), *cert. denied,* 499 U.S. 921 (1991); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). *But see Boise Cascade Corp. v. FTC,* 837 F.2d 1127 (D.C. Cir. 1988).

competition. Section 2(a) contains several mechanisms that provide a substantial degree of protection to individual sellers, but Congress did not adopt the approach taken by the lower court of excluding evidence of competition on the "injury to competition" element.

I. THE NINTH CIRCUIT'S DECISION THREATENS SUBSTANTIAL HARM TO PERSONAL COMPUTER MAKERS

The Ninth Circuit's interpretation of Section 2(a) threatens to injure competition in the PC market by forcing manufacturers to adopt rigid pricing and distribution structures to avoid treble damage liability. If PC manufacturers cannot defend price concessions demanded by certain distributors with proof that competition in the plaintiff's market has not been harmed, they may well decide to forego price reductions that would enhance consumer welfare by promoting interbrand competition. While other industries will experience similar effects, the complexity of distribution arrangements, short product cycles, and intense price competition in the PC industry compound the impact of the Ninth Circuit's decision.

H-P and Compaq sell PCs through multi-tier distribution systems, focusing on different segments of the market with different resellers. Both companies sell lines or "families" of computers which are targeted primarily to either commercial or consumer end-users.

-- For commercial customers, H-P and Compaq sell primarily through large aggregators and distributors that purchase PCs from many manufacturers. These channels of distribution provide varying levels of additional customization, services, support and marketing assistance. H-P and Compaq channels then sell to authorized dealers; value-added resellers who add functionality and provide

services to customers; and other companies which sell directly to corporate end-users.

-- For consumer customers, H-P and Compaq sell PCs which are targeted to consumer preferences, and include features not found in PCs for the commercial market, such as multimedia packages, speakers and additional software aimed at individuals. In some cases, PCs are purchased by direct-buying retailers; in other cases, the computers are sold through aggregators or distributors which sell product on both the commercial and consumer sides of the business.

-- Compaq also sells a small number of PCs directly to end-users through a direct distribution program.

H-P, Compaq and other multi-tier computer sellers face intense competition from several PC manufacturers which sell directly to end-users, without intervening stores or distributors, through sophisticated telephone, mail order and Internet sales mechanisms. PC manufacturers also face competition from small "screwdriver" assemblers, which have captured a significant share of the market by selling PCs built from components directly to end-users. These direct sellers and screwdriver assemblers are essentially exempt from the Robinson-Patman Act due to their direct relationship with end-users. While technically covered by the Act, end-users in disparate businesses are not likely to suffer any injury, let alone antitrust injury, if they receive different prices.

The PC market in general has experienced rapid increases in output and substantial reductions in prices for a comparable level of performance. At the manufacturer level, the industry is highly competitive, with no producer enjoying more than 15% of the market. The market is highly competitive within each of several competing distribution models, and distribution systems continue to develop so that they better match evolving consumer purchasing preferences.

Further, continuous technological innovation means that the market life of a PC may be as short as six to nine months, after which the PC may be marketable only at a deep discount, even though it remains fully functional.

In this environment, a PC manufacturer is frequently presented with demands from specific distributors for unique price concessions to promote that manufacturer's product rather than another maker's PC in a specific market niche, or to develop the market for a new product by offering certain services to customers, or to compete for a specific order or group of orders. PC makers often have little time to consider these requests, given competitive pressures and the presence of direct sellers which post prices directly on the Internet. The ability to justify such a pricing decision for Robinson-Patman purposes by proof of vigorous interbrand competition may play a determining role in the manufacturer's decision to grant a price concession. However, the Ninth Circuit's decision that the inference of harm to competition may not be rebutted by actual market evidence threatens to chill these decisions and rigidify the PC pricing system and distribution structure.

The Ninth Circuit's interpretation of Section 2(a) will have several negative effects upon manufacturers, including H-P and Compaq. In particular, Robinson-Patman counseling will become conservative, constraining efficient distribution, due to uncertainty as to the state of the law. Pricing decisions will be driven, not by competitive considerations, but by the time and resources necessary to satisfy the requirements of the "meeting competition" and "cost justification" affirmative defenses. The administrative demands of these safe harbors are notoriously tricky even in sedate markets, let alone in rapidly evolving distribution

systems like those found in the PC market.[3] PC makers may be tempted to engage in product differentiation by adding costly but unnecessary features in order to create products that are of "unlike grade or quality" for Robinson-Patman purposes.[4] Finally, when considering the obsolescence rationale, a PC maker will face substantial jeopardy in deciding whether a fully functional product has outlived its utility in the market and thus justifies deep price discounting. Inventory management decisions of this sort are an important competitive factor in the PC market, where products become obsolete quickly and must constantly be priced in an aggressive fashion in order to sell.

The Ninth Circuit's decision also limits the ability of PC makers to target new markets and experiment with new distribution structures. For example, the market for small to medium-size businesses is not always served efficiently by the PC industry. There are few sellers which cater specifically to this segment and understand their hardware, software and set-up needs. However, under the Ninth Circuit's decision, PC manufacturers are constrained in their ability to offer lower pricing to a reseller which wishes to target this area and develop expertise in servicing this group of customers, even though such a discount would foster competition in the long run by focusing resellers on a previously underserved portion of the market. Similarly, PC makers may be constrained in their ability to use price concessions to encourage resellers which are experimenting with new marketing techniques or services, such as Internet selling or outsourcing of certain functions, even where those

---

[3] *See* U.S. Department of Justice, *Report on the Robinson-Patman Act* 18-28 (1977)(hereinafter, *"DOJ Report"*).

[4] *See DOJ Report* at 75-79; KINTNER, FEDERAL ANTITRUST LAW § 31.10 (1983).

services may ultimately benefit the consumer and the market as a whole.[5]

Finally, the Ninth Circuit's decision may constrain the ability of PC manufacturers to adjust prices in response to short-term or localized fluctuations affecting particular markets or even particular distributors, such as component shortages, the introduction of new products, technical "bugs" or the normal give-and-take of supply and demand. PC manufacturers need the flexibility to deal with such common problems through pricing decisions in order to maintain their competitiveness.[6]

II. THE NINTH CIRCUIT MISCONSTRUED SECTION 2(a) IN BARRING USE OF EVIDENCE OF COMPETITION TO REBUT THE INFERENCE OF INJURY TO COMPETITION

The Ninth Circuit misconstrued the "injury to competition" element of Section 2(a). The court held that the plaintiff in a secondary-line case may conclusively demonstrate the prohibited effect on competition simply by showing that it has been charged a higher price than its

---

[5] *See* KINTNER at § 31.8-31.9 (Robinson-Patman Act has been criticized for inhibiting entry into new markets and erecting obstacles to development of more efficient methods of distribution and resale); *DOJ Report* at 64-71. *See also* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 132 (1962)(interpretation of law to protect individual competitors is tantamount to a prohibition of limited experimentation with new price policies, adjustment of prices to varying conditions of demand, and response to competitive pressures that are not generalized).

[6] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION & ITS PRACTICE § 14.6 (1994)(Robinson-Patman Act has effect of overdeterring healthy pricing activity, deterring price cuts that are "part of the normal give-and-take" of the competitive market process); ROWE at 132.

competitor. This presumption, according to the court, may not be rebutted by proof that competition at the distributor level remains robust. This is a critical question for the enforcement of the Robinson-Patman Act on which the courts of appeals are divided.

The text of Section 2(a) demonstrates that evidence of actual competition in the affected market is relevant to resolution of the "injury to competition" element. Nothing in this Court's prior Section 2(a) decisions supports the lower court's conclusion that the *Morton Salt*[7] inference of harm to competition, which may be drawn from proof of price discrimination, may not be rebutted by evidence of competition. Further, the Ninth Circuit expressly declined to follow the principles set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. at 209, and its decision is inconsistent with that case in several respects. Finally, by ignoring this Court's explicit direction in *Brooke Group* that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws," 509 U.S. at 220, the Ninth Circuit aggravated a conflict between Section 2(a) and the other antitrust laws by equating injury to an individual competitor with injury to competition.

Like the other courts of appeals that have held that the presumption of injury to competition may not be rebutted with market evidence, the Ninth Circuit ignored the text of Section 2(a) and instead relied on selected portions of the legislative history. However, "the statute itself spells out the conditions which would make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960)

---

[7] *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

Properly construed, Section 2(a) does evince a Congressional concern to provide protection to individual competitors. But it accomplishes this goal in other ways than outlawing evidence of the actual state of competition at the distributor level. First, the threshold for proving the "discrimination in price required to be proved in secondary-line cases" is set at a low level and "may be established by showing a mere price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. at 536. Second, Section 2(a) is an incipiency statute, under which the plaintiff need prove only that there is some likelihood that a given price discrimination "may . . . substantially lessen competition". Third, the plaintiff's evidentiary burden is further reduced by allowing it to make a *prima facie* showing of injury to competition through an inference generated by proof of a significant price difference sustained over time, thereby shifting to the seller the burden of rebutting the showing.[8]

These mechanisms provide a substantial degree of protection to individual competitors. Nothing in the text of Section 2(a) or its legislative history suggests that Congress went further, however, and made the inference of injury to competition irrebuttable, regardless of evidence of the state of competition at the distributor level.

In holding that the *Morton Salt* inference may not be rebutted with evidence that competition in the relevant market remains healthy, the Ninth Circuit has essentially treated Section 2(a) like a *per se* offense, in which the showing of a mere price difference automatically suffices to prove liability unless the seller qualifies for one of the

---

[8] *See Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1982).

narrow safe harbors provided by the Act.[9] This interpretation clearly is inconsistent with this Court's decisions which establish that a particular practice may be treated as *per se* illegal only if it has pernicious effects on competition which have been proven over time.[10] That demanding standard is not satisfied here.

The Ninth Circuit thus has ignored Section 2(a)'s intended function among the antitrust laws and turned it into "a font of tort law for battered businesses." *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1340-41 (8th Cir. 1987).

A. The Text Of The Robinson-Patman Act Permits The Defendant To Introduce Evidence Of Absence Of Injury To Competition

Section 2(a) provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them.

In order to recover under Section 2(a), the plaintiff must prove three elements: (1) that the defendant

---

[9] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990), quoting *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982).

[10] *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1983).

discriminated in price between two entities; (2) which produced "injury to competition"; and (3) the plaintiff suffered "antitrust injury" -- that is, the alleged price discrimination produced effects of the type the antitrust laws were intended to prevent. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 556, 559 (1990); *J. Truett Payne Co. v. Chrysler Motors Corp*, 451 U.S. 557, 562 (1981).

1. The Court has held that the "price discrimination" element may be satisfied by proof of a mere difference in prices. *Anheuser-Busch*, 363 U.S. at 550. *Morton Salt* further provides that an inference of injury to competition may be drawn from the showing of a substantial price discrimination to a single competitor.[11] Such an inference may satisfy plaintiff's obligation to make out a *prima facie* case on this element, and thereby justify submitting the case to the jury. However, nothing in *Morton Salt* and its progeny suggests that this inference may not be rebutted by evidence of the actual effect of the alleged difference in prices on competition. To the contrary, prior decisions of this Court and the lower courts demonstrate that the plaintiff must *prove* harm to competition and that the seller may rebut his *prima facie* showing in numerous ways, with a variety of types of evidence.[12] Once the plaintiff has made out its

---

[11] In *Hasbrouck*, the Court described this point as the "holding" in *Morton Salt*. 496 U.S. at 559. However, it is not clear from *Morton Salt* that this was in fact the basis of the Court's decision. In the opinion, there are repeated references to the FTC having *proved* actual injury to competition through substantial evidence. 334 U.S. at 46-48.

[12] Rowe identified four instances in which the inference of injury to competition is rebutted: (1) if there are intervening economic factors; (2) when competitive injury is attributable to competitive inertia by the disfavored buyer (*e.g.*, a refusal to lower price to remain competitive); (3) when the discriminatory price is also available from another source; and (4) if the price advantage gained by the favored buyer is offset by costs. ROWE at 186-95. These four types of rebuttal

prima facie case, the defendant should be allowed to rebut any inference of harm to competition with evidence that competition in the relevant market remains vigorous.[13]

The Ninth Circuit has essentially eliminated the "injury to competition" element as part of plaintiff's proof. It has converted a *prima facie* showing into a conclusive proof of "injury to competition", by denying the defendant

---

Footnote continued from previous page

evidence have successfully been employed in a number of lower court cases. *See, e.g., Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir. 1991)(no injury to competition if same price is available to buyer from another seller); *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1976)(same); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 703-04 (9th Cir. 1964) (same); *Alexander v. Texas Co.*, 165 F. Supp. 53, 58, 59 (W.D. La. 1958)(gasoline dealer sued suppliers for having granted discriminatory price reduction to assist in coping with a local "price war"; plaintiff's own refusal to reduce prices to prevailing "price war" levels caused alleged injury); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 792 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952)(price discrimination in sale of a component part had little impact on price for completed product because the ultimate cost of the product sold was determined by many other factors, such as advertising).

[13] Commentators such as Rowe have concluded that a number of factors may indicate the absence of competitive injury, such as (1) decline in the seller's market share, notwithstanding price differentials, (2) minor overall market position of the seller, (3) growth of the seller's competitors, (4) prevalence of comparable price variations on the part of competitors, (5) inroads by sellers on each others' customers, (6) ease of entry by new sellers, (7) overall dynamism of market, (8) competition by seller against strongly entrenched regional competitors, (9) effort by seller to improve his deteriorating market position, or temporary price experimentation to this end. ROWE at 160-61; *see also Brooke Group*, 509 U.S. at 226 ("essential components of real market injury" include the degree of competition in the market, ease of entry, and indications that the defendant cannot absorb market share of rivals because of lack of capacity).

the ability to counter that showing with evidence of the actual state of competition. Under the decision below, the inquiry jumps directly from proof of a price difference to the question of whether the harm allegedly caused to plaintiff qualifies as "antitrust injury."

2. The Ninth Circuit ignored the language of Section 2(a) that expressly provides for consideration of evidence of the actual state of competition in resolving the "injury to competition" element. The relevant portion of Section 2(a) prohibits price discrimination that may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them". Under this provision, the alleged effect on competition may be analyzed from three vantage points. Evidence of the state of competition in the affected market is relevant in each instance.

-- First, insofar as the provision addresses "competition with any person who . . . grants" a favorable price, Section 2(a) is concerned with primary-line discrimination. In *Brooke Group*, the Court determined that evidence of competition in the primary market is relevant to resolution of such a claim. 509 U.S. at 226.

-- The next phrase in the statute prohibits price discrimination that may "injure, destroy or prevent competition with any person who . . . *knowingly receives* the benefits of such discrimination." This provision is concerned with secondary-line discrimination. It requires the reviewing court to analyze the state of competition from the point of view of a favored distributor which knowingly receives a price discount from the seller. Evidence concerning the competitive position of the favored distributor is the focal point of this inquiry, consistent with the legislative history of the Act focusing on "power buyers" such as national grocery chains. *See FTC v. Morton Salt Co.*, 334 U.S. at 43. The defendant therefore is entitled to

introduce evidence of the overall state of competition in the market and how the favored distributor stands with respect to that competition.

-- The final phrase prohibits price discrimination that may "injure, destroy or prevent competition . . . with customers of either" a discriminating seller or a favored buyer. This provision thus may address either secondary-line (customers of a seller) or tertiary-line discrimination (customers of a knowing recipient of a price differential). In either event, the statute requires the court to analyze "competition . . . with customers". This is a factual question, as to which the defendant is entitled to introduce relevant evidence of the competitive position of the various -- plural -- entities in the market.

The Ninth Circuit, however, did not follow the language of Section 2(a) with respect to the proof relevant to the "injury to competition" element. The court of appeals looked at the evidence exclusively from the point of view of the disfavored distributor alone and asked whether its ability to compete had been adversely affected. This inquiry is appropriate under Robinson-Patman, but not for the "injury to competition" element of the offense. Rather, it is relevant to the "antitrust injury" question, where in order to recover treble damages, the plaintiff must prove that the alleged price discrimination caused it damages of the type the antitrust laws were intended to prohibit. For the "injury to competition" element, however, the statute authorizes the seller to defend by introducing evidence of competition.

3. The Ninth Circuit's decision ignores the differences between Section 2(a) and Sections 2(d) and 2(e), which prohibit discrimination in the provision of promotional allowances and services, without requiring proof of injury to competition. The courts have treated Sections 2(d) and 2(e) as creating *per se* offenses. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). By allowing a Section

2(a) offense to be proved by a conclusive inference, without regard to actual evidence about competition in the market, the court of appeals essentially has eliminated an essential element of the offense. This is contrary to the plain language of the statute. Congress clearly knew how to dispense with the requirement of proof of injury to competition when it wished, but chose to include such an element in Section 2(a). The Ninth Circuit's decision, however, effectively reads that requirement out of the statute.

B. The Ninth Circuit's Application Of Section 2(a) To Secondary-Line Competition Is Inconsistent With This Court's Application Of This Provision To Primary-Line Competition

The Ninth Circuit recognized that this Court in *Brooke Group* had construed Section 2(a) to require consideration of evidence concerning the degree of competition in the relevant market. However, the court of appeals declined to apply the principles of *Brooke Group* to this secondary-line case, based on its interpretation of the legislative history. Its refusal to follow *Brooke Group* creates intolerable confusion about the proper construction of Section 2(a) and warrants review by this Court.

In *Brooke Group*, the Court stated that Section 2(a) "should be construed consistently with broader policies of the antitrust laws". 509 U.S. at 220. It further concluded that Congress "did not intend to outlaw price differences that result from or further the forces of competition". *Id.* Rather, the Court analyzed "essential components of real market injury", including factors such as whether "the market is highly diffuse and competitive" and whether "new entry is easy". *Id.* at 226. In particular, the Court cautioned against excessive reliance on inferences in deciding Section 2(a) cases, because "the costs of an erroneous finding of liability are high" and "mistaken inferences . . . are especially costly,

because they chill the very conduct the antitrust laws are designed to protect." *Id.*

The Ninth Circuit refused to apply these principles because of what it found to be "significant differences between primary- and secondary-line claims". (Pet. App. at 11a). However, there is no basis in the statute for drawing such an analytical distinction between primary- and secondary-line discrimination. The apparent distinction on which the Ninth Circuit relied so heavily is not a distinction found in the text of the statute, but simply a form of shorthand developed by the courts to explain their reasoning.[14]

By refusing to follow *Brooke Group*, the Ninth Circuit has inappropriately widened the gap between the application of Section 2(a) in primary- and secondary-line cases. Nothing in the language of the statute or *Brooke Group* suggests that the concept of what constitutes injury to "competition" should be applied in a fundamentally different fashion in primary- and secondary-line cases. Indeed, as one commentator has concluded:

> It would be incongruous, indeed, were the Act to be interpreted as concerned with competition and the consumer welfare as to primary-line competition, but not as to secondary- line competition, especially when the same competitive effects language applies

---

[14] JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS & TRADE REGULATION § 38.01 (2d ed. 1997) ("Section 2(a), on its face, seems to apply the same standards of competitive injury regardless of the level at which the injury occurred. But the courts and the [FTC] view differently the consequences of pricing practices at each level, and require different standards of proof to establish the substantiality of adverse effects on competition at different levels"); ROWE at 124.

to both levels of competition. Such an interpretation would result in legal schizophrenia.[15]

C. The Court Should Determine Whether Section 2(a), In Secondary-Line Cases, Is To Be Interpreted Consistently With The Other Antitrust Laws

In holding that an inference of injury to competition, once invoked, is not rebuttable with evidence of healthy competition at the distributor level, the Ninth Circuit has subscribed to a reading of Section 2(a) which aggravates the conflict between the Act and the rest of the antitrust laws. In *Brooke Group,* the Court stated that "it is axiomatic that the antitrust laws were passed for 'the protection of *competition,* not *competitors.*" 509 U.S. at 220 (citation omitted). This principle, although articulated in the context of a primary-line case, should apply to secondary-line cases as well, since the same statutory language applies in both instances.

In holding that robust competition at the distributor level is irrelevant to the injury element, the court of appeals ignored this Court's instruction that the Robinson-Patman Act should be construed in a manner consistent with the other antitrust laws.[16] The Petition makes a compelling

---

[15] Paul LaRue, *The Robinson-Patman Act in the Twenty-First Century: Will The Morton Salt Rule Be Retired?* 48 SMU L. Rev. 1917, 1927 (1995); HOVENKAMP at § 14.6a (after *Brooke Group*, "there is a major anomaly in the way that the same statutory language is interpreted in primary-line as opposed to secondary-line situations. A reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue").

[16] *See, e.g., Brooke Group,* 509 U.S. at 220; *Great Atl. & Pac. Tea Co. v. FTC,* 440 U.S. 69, 80 (1979)(citations omitted)(expressing concern about "interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act ... [thus] giving rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation'"); *United States v. U.S. Gypsum Co.*, 438 U.S. 422,

showing (Pet. at 17-19) that the decision below conflicts with several Supreme Court decisions over the last decade, which uniformly rejected interpretations of Section 2(a) that would have improperly protected individual competitors by erecting barriers to price reductions and deterring welfare-enhancing distribution practices.

Further, there is a fundamental inconsistency between the lower court's treatment of the *Morton Salt* inference and the Court's development of the antitrust injury doctrine in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 340, and *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. at 557. This Court has repeatedly emphasized that there must be antitrust injury before liability may be imposed under any antitrust statute, including the Robinson-Patman Act, and that *Morton Salt* antitrust injury requires proof of adverse effects on *competition*. Indeed, in *Brooke Group*, this Court relied on its earlier decision in *Atlantic Richfield* in concluding that the procompetitive benefits of pricing practices are entitled to substantial weight in enforcing the Robinson-Patman Act:

> Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim involved.

Footnote continued from previous page

447-459 (1978); *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953)(there is a "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress"); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)(antitrust laws were generally designed to "protect competition, not competitors").

509 U.S. at 223, *quoting Atlantic Richfield,* 495 U.S. at 340.

Here, however, the Ninth Circuit has sanctioned a conclusive inference of injury to competition even where the seller lacks market power, competition in the product market is robust, no distributor has market power, barriers to entry are low, and the difference in price allegedly involved is approximately 2%. (Pet. App. at 14a). Rather than promoting antitrust goals and "seeking to preserve competition in order to guarantee the consuming public the progress and benefits of enterprise," it has applied Section 2(a) to "protect individual business firms from the discomforts of vigorous competition."[17]

CONCLUSION

For the foregoing reasons, *amici curiae* Hewlett-Packard Company and Compaq Computer Corporation respectfully submit that the Petition for a Writ of Certiorari should be granted.

Of Counsel:
Gilad Ohana
HEWLETT-PACKARD COMPANY
3000 Hanover Street
Palo Alto, California 94304

Scott Hoing
COMPAQ COMPUTER CORPORATION
P.O. Box 692000
Houston, Texas 77269

September 18, 1997

John F. Cooney
Counsel of Record
William D. Coston
Melissa Landau Steinman
VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Attorneys for Amici Curiae Hewlett-Packard Company and Compaq Computer Corporation

[17] ROWE at 130.

MOTION FILED

SEP 18 1997,

Supreme Court, U.S.
FILED
SEP 18 1997
CLERK

No. 97-307

In The Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER

Of Counsel:
G. WILLIAM FRICK
HARRY M. NG
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8089

JERROLD J. GANZFRIED
Counsel of Record
WILLIAM R. O'BRIEN
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, DC 20005
(202) 783-0800
Attorneys for American Petroleum Institute

30 pp

In The Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-307

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Petroleum Institute (API) hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of API in this cases arises from the fact that many of API's member companies are engaged in nationwide marketing and distribution activities. Accordingly, API's members have a vital interest in the correct perception of the Robinson-Patman Act within the overall federal antitrust landscape. This interest is reflected in the participation of many of API's individual members in Robinson-Patman Act cases in this Court for many decades. *E.g., Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *Perkins v. Standard Oil Co.*, 395

U.S. 642 (1969); *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). Given such past litigation of Robinson-Patman Act issues in the petroleum industry, API believes that its participation as amicus curiae can provide the Court with a fuller perspective of the historical interaction among the Robinson-Patman Act, the Clayton Act and the Sherman Act. Moreover, the attached amicus brief discusses more fully than the petition this Court's long-standing vigilance in granting certiorari to correct overly expansive readings of the Robinson-Patman Act that might adversely affect competition. Because API's members include firms that market products nationwide and face the patchwork quilt of conflicting circuit court decisions on the issue presented in this case, API believes that it can add to the Court's understanding of the practical factors that strongly favor review.

Accordingly, API requests that the Court grant leave to file the attached amicus curiae brief.

Respectfully submitted.

Of Counsel:
G. WILLIAM FRICK
HARRY M. NG
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8089

JERROLD J. GANZFRIED
Counsel of Record
WILLIAM R. O'BRIEN
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, DC 20005
(202) 783-0800
Attorneys for American Petroleum Institute

No. 97-307

In The Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER

Of Counsel:
G. WILLIAM FRICK
HARRY M. NG
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8089

JERROLD J. GANZFRIED
Counsel of Record
WILLIAM R. O'BRIEN
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, DC 20005
(202) 783-0800
Attorneys for American Petroleum Institute

QUESTION PRESENTED

Whether, under the Clayton Act, as amended by the Robinson-Patman Act, injury to competition in a secondary-line price discrimination case is irrebuttably established by proof of injury to a competitor.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICUS CURIAE.....1

INTRODUCTION AND STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE PETITION.....6

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Alan's of Atlanta, Inc. v. Minolta Corp.,
903 F.2d 1414 (11th Cir. 1990) 9,19

Automatic Canteen Co. v. FTC,
346 U.S. 61 (1953) 8, 9, 14, 15

Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir. 1986) 9

Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,
842 F.2d 578 (2d Cir. 1987) 9, 19

Black Gold, Ltd. v. Rockwool Industries, Inc.,
729 F.2d 676 (10th Cir.), *cert. denied*,
469 U.S. 854 (1984) 10

Boise Cascade Corp. v. FTC, 837 F.2d 1127
(D.C. Cir. 1988) 4, 9, 10, 11, 19

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 12, 17

Coastal Fuels v. Caribbean Petroleum Corp.,
79 F.3d 182 (1st Cir.), *cert. denied*,
117 S. Ct. 294 (1996) 10, 19

Corn Products Refining Co. v. FTC,
324 U.S. 726 (1945) 7

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 17

FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 8, 13

FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) 8

FTC v. Morton Salt Co.,
334 U.S. 37 (1948) 4, 5, 7, 12, 13

Foremost Dairies, Inc. v. FTC, 348 F.2d 674
(5th Cir.), *cert. denied*, 382 U.S. 959 (1965) 9

Foremost Pro Color, Inc. v. Eastman Kodak Co.,
703 F.2d 534 (9th Cir. 1983), *cert. denied*,
465 U.S. 1038 (1984) 5, 10

Garcia v. United States, 469 U.S. 70 (1984) 17

Great Atlantic & Pacific Tea Co. v. FTC,
440 U.S. 69 (1979) 8, 13, 14, 15

H.L. Hayden Co. v. Siemens Medical Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 9, 19

Hubbard v. United States, 514 U.S. 695 (1995) 15

Interstate Cigar Co. v. Sterling Drug, Inc.,
655 F.2d 29 (2d Cir. 1981) 9, 19

J.F. Feeser, Inc. v. Service-a-Portion, Inc.,
909 F.2d 1524 (3d Cir. 1990),
cert. denied, 499 U.S. 921 (1991) 5, 10, 19

J. Truett Payne Co. v. Chrysler Motors Corp.,
451 U.S. 557 (1981) 17

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) 16

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989) 10, 19

Montclair v. Ramsdell, 107 U.S. 147 (1883) 16

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 8

Perrin v. United States, 444 U.S. 37 (1979) 15

Philbrook v. Glodgett, 421 U.S. 707 (1975) 17

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 11

Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 9

Richards v. United States, 369 U.S. 1 (1962) 17

Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987) 10

Rubin v. United States, 449 U.S. 424 (1981) 16

Russello v. United States, 464 U.S. 16 (1983) 15, 17

Sorenson v. Secretary of the Treasury, 475 U.S. 851 (1986) 18

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 7

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990) 5

United States v. Naftalin, 441 U.S. 768 (1979) 17

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 13, 14, 15

United States Department of Treasury v. Fabe,
508 U.S. 491 (1993) 16

STATUTES

Clayton Act § 2(a) as amended by the
Robinson-Patman Act, 15 U.S.C. § 13(a) ..... *passim*

Clayton Act § 4, 15 U.S.C. § 15 17

RULES

Supreme Court Rule 37.6 1

In The Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-307

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,

v.

CHARLES T. VON DER AHE and CHROMA LIGHTING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The American Petroleum Institute (API), a non-profit District of Columbia corporation, is a national trade association.[1] More than 300 companies are members and represent various facets of the petroleum industry: exploration, production, transportation,

---

[1] Pursuant to Supreme Court Rule 37.6, amicus API states that its counsel authored this brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members and counsel.

refining and marketing. Many of API's member companies are engaged in nationwide marketing and distribution activities. Accordingly, API's members are vitally interested in the uniform and correct interpretation of federal antitrust laws. The splintered, conflicting views of the courts of appeals on the issue presented in this case hinder the decisionmaking process for marketing in the petroleum industry and other industries essential to the nation's economy. API believes that its participation will provide the Court with a broader perspective on the question presented and will help bring into focus the economic issues that underlie that antitrust question.

INTRODUCTION AND STATEMENT OF THE CASE

The courts of appeals are irreconcilably in conflict on a question of statutory construction that assuredly warrants this Court's review. At issue is whether the Robinson-Patman Act amendments to the Clayton Act preclude any inquiry into the competitive effect of alleged price discrimination. The court below held that evidence of price discrimination creates an irrebutable presumption of injury to competition. In reaching this result, the Ninth Circuit expressly disagreed with more discerning decisions of other courts of appeals that permit a defendant to establish the absence of harm to competition. The Ninth Circuit also misunderstood this Court's admonition that the Robinson-Patman Act reaches price discrimination "only to the extent it threatens to injure competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

In short, the case presents an important question concerning the extent to which the Robinson-Patman Act must co-exist with the Clayton Act, of which it is a part, and the Sherman Act, with which it shares a common purpose. The frequency with which the courts of appeals have confronted this issue with divergent results demonstrates the compelling need for a uniform, correct perception of the role of the Robinson-Patman Act within the overall context of federal antitrust legislation. As this Court has recognized, overly expansive views of the Robinson-Patman Act would have a pernicious effect on competition. For this very reason, the Court has granted certiorari in the past to avoid such deleterious economic consequences. *See infra* at 7-9. The same result should obtain here.

1. From 1987 to 1991, respondent was one of hundreds of distributors of lighting products in the highly competitive Southern California market. Pet. App. 3a; Pet. 3-4. During that period, respondent distributed petitioner's products along with those many other manufacturers. Pet. 4. After shutting the doors on its unprofitable business, respondent filed a complaint alleging discriminatory pricing practices. Specifically, respondent claimed that petitioner gave discounts to larger distributors that were not available to respondent, in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Respondent also asserted claims under state law that are not at issue in the petition for a writ of certiorari. Following a jury trial in the United States District Court for the Central District of California, respondent was awarded treble damages of $3,525,000 on its Robinson-Patman Act claim. Pet. App. 4a.

2. The United States Court of Appeals for the Ninth Circuit affirmed, rejecting all of petitioner's contentions under the federal antitrust laws. Pet. App. 1a-13a. The cornerstone of the Ninth Circuit's opinion is the holding that evidence of injury to an individual competitor creates an irrebutable presumption of injury to competition in a secondary-line Robinson-Patman Act case. *Id.* at 10a, 12a. Three aspects of the opinion are particularly pertinent to this Court's consideration of the petition for a writ of certiorari.

First, the opinion below addressed a question that this Court has not definitively resolved and on which the circuit courts are in conflict. Commencing its analysis with reference to the holding in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), that the Robinson-Patman Act permits competitive injury to be inferred from evidence of injury to an individual competitor, the Ninth Circuit turned to a question *Morton Salt* "left open," *viz.*, "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." Pet. App. 4a. On that question, as the opinion below noted, "the circuits are divided." *Id.* at 4a-5a. Assessing this conflict of authority, the court below juxtaposed the irreconcilable holding of the District of Columbia Circuit in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), with those of the Third and Eleventh Circuits. Pet. App. 4a-8a. As the opinion below explained, the D.C. Circuit held that "the inference of competitive injury may be rebutted by a showing of no actual harm to competition because the Robinson-Patman Act must be construed in light of the pro-competitive purpose of all other antitrust

legislation." Pet. App. 5a. In contrast, the Third Circuit held that "the inference of competitive injury may not be overcome by evidence of no harm to competition because the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." *Id. (citing J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991)). After reciting the analysis employed in the other courts of appeals, the opinion below ultimately agreed with those that have rejected the holding of the D.C. Circuit.

Second, the court perceived that its holding was contrary to the view expressed in prior Ninth Circuit cases that "the Robinson-Patman Act, like other antitrust laws, must be construed to protect competition, not individual competitors." Pet. App. 10a (*citing Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)). Acknowledging that *Foremost Pro* supports petitioner's contention that a defendant may show that its conduct did not harm competition, the court held that *Foremost Pro* was "overruled, *sub silentio*" by *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). For this conclusion, the court below conferred dispositive significance on the fact that when the opinion in *Hasbrouck* stated that harm to competition could be inferred from evidence of harm to an individual competitor -- precisely the holding in *Morton Salt* more than 40 years earlier -- this Court did not discuss *Foremost Pro*. Pet. App. 11a. In the Ninth Circuit's view, this Court's reliance on its own prior decisions somehow "undermin[ed] the holding of *Foremost Pro*." *Id.* On the basis of this reasoning, the court below held that it was "no longer bound by the reasoning of *Foremost Pro*." *Id.*

Third, the Ninth Circuit accorded no weight to this Court's post-*Hasbrouck* statement that "'the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure competition.'" Pet. App. 12a (*quoting Brooke Group*, 509 U.S. at 220). In the Ninth Circuit's view, the statutory construction in *Brooke Group* applies only to primary-line cases (*i.e.*, competition with the seller) and has no place in secondary-line cases. Pet. App. 12a. Without any basis in the Act's language, the court below held that the meaning of the statutory word "injury" differs from case to case depending on the particular plaintiffs.

REASONS FOR GRANTING THE PETITION

This case is an ideal candidate for this Court's review of an important, frequently recurring question of federal law on which the courts of appeals disagree. By creating an irrebutable presumption of injury to competition, the decision below has transformed a prima facie showing of price differential into a per se offense subject to treble damages. By its clear terms, the decision below proscribes conduct that in fact promotes competitive marketing activities. Aside from the chilling effect this holding would have on competition within the Ninth Circuit (and other regions where courts have reached similar conclusions), it poses an acute dilemma for manufacturers whose products are distributed nationwide. Decisionmakers in the petroleum industry (and many others) face the prospect of devising national marketing plans and pricing structures under legal standards that vary from circuit to circuit. Real indeed is the prospect that companies will forgo more aggressive competitive measures in order to guard against potential liability.

In addition to the intensely practical economic factors that favor this Court's review, this case warrants certiorari in order to correct fundamental errors in statutory construction that plague the decision below. By judicial fiat, the court of appeals has revised the statute to eliminate the element of injury to competition in a broad category of cases. That result is contrary to the language Congress enacted, contrary to the unmistakable mission of the antitrust laws to boost competition, and contrary to this Court's guidance in cases construing the same statutory provisions. Accordingly, this Court should exercise its certiorari jurisdiction and reverse.

1. Since the enactment of the Robinson-Patman Act amendments to the Clayton Act, this Court has been alert to resolving circuit conflicts and assuring correct, uniform interpretations of this important antitrust legislation. In *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 730 (1945), the Court observed that it granted certiorari to address the standards for proving the requisite effect on competition under § 2(a) "because the questions involved are of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems." In *FTC v. Morton Salt Co.*, 334 U.S. 37, 40 (1948), which dealt with precisely the same statutory provision at issue here, the Court granted certiorari "[s]ince questions of importance in the construction and administration of the Act were presented. . . ." *See Standard Oil Co. v. FTC*, 340 U.S. 231, 234 (1951) ("case presents an important issue under the Robinson-Patman Act which has not been settled by this Court").

Cognizant of the immense impact the federal antitrust laws have on the nation's economy, the Court

has been particularly vigilant to correct erroneous interpretations of the Robinson-Patman Act that would adversely affect competition. For example, in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953), the Court explained that the FTC's enforcement views "might readily extend beyond the prohibitions of the [Robinson-Patman] Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. We therefore thought it necessary to grant certiorari." *Id.*

Similar vigilance informed the Court's grant of review in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 541 (1960), to resolve fundamental definition issues under § 2(a) "because a conflict had developed among the Courts of Appeals on a question of importance in the administration of the statute." Even in cases where circuit conflicts did not exist, certiorari has been granted "to determine whether the Court of Appeals . . . had correctly construed the Robinson-Patman Act," *Perkins v. Standard Oil Co.*, 395 U.S. 642, 644 (1969), "because the case presents important questions concerning the scope of a key provision of the Robinson-Patman Act," *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 343 (1968), and "[b]ecause the judgment of the Court of Appeals raises important questions of federal law [under § 2(a)]," *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 75 (1979) (*"A&P"*).

The present case fits comfortably within these parameters. The circuits are in conflict on an important provision of § 2(a). The Ninth Circuit's woodenly incorrect statutory interpretation will impede procompetitive pricing activities, thus threatening a regime of "price uniformity and rigidity in open conflict with the purposes of other antitrust

legislation." *Automatic Canteen*, 346 U.S. at 63. For the same reasons that have warranted review of crucial Robinson-Patman issues over the last six decades, the petition for a writ of certiorari should be granted.

2. The conflict that exists among the courts of appeals on the injury to competition element of § 2(a) is inexorable and irreconcilable. As the Eleventh Circuit perceived more than seven years ago, "[a] controversy has raged (and continues to rage) over the meaning of the word 'competition' as used in the so-called 'competitive injury' phrase of section 2(a)." *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990) (citing inconsistent decisions of the District of Columbia, Fifth, Seventh, and Eighth Circuits).[2] Since then, the conflict has intensified.[3] The

---

[2] Among the cases cited by the Eleventh Circuit are: *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988) (harm to competition is pivotal); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 678 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) (§ 2(a) protects injury to competition as well as injury to competitors); *Ball Mem'l Hosp. Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (Robinson-Patman Act refers to competition in general, not competitors).

[3] In fact, the divergence of views among the circuit courts was even more pronounced prior to 1990 than the Eleventh Circuit perceived. *See, e.g., Interstate Cigar Co. v. Sterling Drug, Inc.*, 655 F.2d 29, 31 (2d Cir. 1981) (showing that challenged discount "would tend to lessen competition substantially or to create a monopoly . . . is an essential condition precedent to establishing" a § 2(a) claim"); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987) (plaintiff in § 2(a) case "also must prove the likelihood of competitive injury resulting from the alleged discrimination"); *H.L. Hayden Co. v. Siemens Med. Sys., Inc.* 879 F.2d 1005, 1021 n.12 (2d Cir. 1989) (§ 2(a) "requires not only proof of price discrimination, but a potential impact substantially to

Third Circuit held in *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), that "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act." In explaining its holding, the Third Circuit observed that, unlike the Sherman Act which protects competition, the Robinson-Patman Act "protect[s] 'those who compete . . . not just the overall competitive practice.'" *Id. (quoting Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989)).[4]

---

lessen competition or create a monopoly"); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387 n.3 (8th Cir. 1987) ("it is settled that the Robinson-Patman Act guards against injury to competition, not injury to individual competitors"); *Foremost Pro Color, Inc. v. Eastman Kodak Co.* 703 F.2d 534, 548 (9th Cir. 1983) ("neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition"), *cert. denied*, 465 U.S. 1038 (1984); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir.) ("to establish a violation of [§ 2(a), plaintiff] must show that the price differential in this case had the requisite potential to substantially affect competition"), *cert. denied*, 469 U.S. 854 (1984).

The multiplicity of views in the courts of appeals reflects the fact that similar analytical questions arise in § 2(a) cases under the rubrics of antitrust standing, antitrust injury, and antitrust damages. Although the contexts may differ, the core issue remains the same, *viz.*, whether the Robinson-Patman Act may impose liability without regard to impact on competition. That question is squarely presented in this case.

[4] More recently, the First Circuit cited with approval the D.C. Circuit's holding in *Boise Cascade*. *See Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996).

The decision below in this case draws extensively on the analysis in *Feeser* and expressly rejects the flatly incompatible holding of the D.C. Circuit in *Boise Cascade*. *See* Pet. App. 6a-10a. As the Ninth Circuit's decision clearly depicts, there is no common ground between those courts of appeals that will scrutinize the evidence in a § 2(a) case to discern the effect, if any, on competition and those that will not. The Ninth Circuit has emphatically joined the circuit courts that end all such inquiry once evidence of price discrimination has been offered. The conflict that the opinion below discusses at length weighs strongly in favor of certiorari.

3. Review is also warranted because the Ninth Circuit's opinion is contrary to the guidance this Court has provided in Robinson-Patman Act cases.

Jumping into the "competition/competitor" debate, the Ninth Circuit failed to perceive the true nature of the controversy. The opinion below proceeds from the faulty premise that injury to competition and injury to a competitor are mutually-exclusive, antithetical concepts. This erroneous dichotomy is neither a necessary nor even a useful framework for analysis of price discrimination claims. At its core, the Ninth Circuit's basic misconception is that, unlike the Sherman Act and the Clayton Act -- which protect competition and not individual competitors -- the Robinson-Patman amendments to the Clayton Act protect only individual competitors and not competition.

The fundamental objective of federal antitrust legislation is to maximize consumer welfare. *See Brooke Group*, 509 U.S. at 220; *Reiter v. Sonotone Corp.*, 442 U.S.

330, 343 (1979). Consistent with that objective, the cases uniformly recognize that vigorous competition will benefit some participants in the market more than others; indeed, vigorous competition will even benefit some market participants at the expense of others. Those results are both inevitable and wholly unremarkable. Equally as important for present purposes, those results of effective competition are healthy and desirable. Accordingly, it is "inimical to the purposes of [the antitrust] laws," to award damages to a market entrant injured by the process of competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

To be sure, as the legislative history set forth in the petition relates (Pet. 10-14), the Robinson-Patman Act amendments to the Clayton Act reflect additional solicitude for certain individual competitors in particular circumstances. But it is an overreaction, unwarranted by either the language or the legislative intent of the Robinson-Patman Act, to say that the protections afforded certain competitors must come at the expense of the very competitive process the antitrust laws are designed to promote. That extreme conclusion, exemplified by the opinion below, would transform the Robinson-Patman amendments into bullets aimed at the heart of the antitrust laws. As the more penetrating opinions of this Court and other courts of appeals confirm, however, the Robinson-Patman Act did not excise all consideration of competitive effect.

In the seminal *Morton Salt* decision, this Court observed that the FTC had received voluminous evidence on the precise issue of injury to competition. 334 U.S. at 50. On that record, the Commission's

findings of the requisite injury to competition "were adequately supported by evidence." *Id.* at 51. Although commenting that the Commission had received more evidence on this issue than the statute requires, this Court plainly did not suggest any rationale for precluding or ignoring such evidence altogether.

Subsequent decisions confirm that the correct reading of *Morton Salt* preserves the relevance of evidence relating to competitive effect. In *FTC v. Anheuser-Busch*, 363 U.S. at 540-550, the FTC found competitive injury in a § 2(a) case and there is not a hint in this Court's opinion suggesting that the Commission went astray in addressing that issue. Quite the contrary. The Court commented on "the statutory provisions regarding injury to competition" and in the course of that discussion expressly relied on *Morton Salt*. 363 U.S. at 550 & n.17. Similarly, in *United States v. United States Gypsum Co.*, 438 U.S. 422, 450 (1978)(*"Gypsum"*), this Court reiterated that § 2(a) "embodies a general prohibition of price discrimination between buyers ***when an injury to competition is the consequence"*** (emphasis added). *See also A&P*, 440 U.S. at 79 (§ 2(a) depends upon competitive injury).

In its most recent relevant analysis of this provision, the Court once again confirmed the requirement of injury to competition that is expressly recited in the statutory language and is a pillar of all federal antitrust legislation. Construing precisely the same portion of § 2(a) in *Brooke Group*, this Court concluded that "Congress did not intend to outlaw price differences that result from or further the forces of competition." 509 U.S. at 220. This Court's plain directive *(id.)* is fully applicable here:

> the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead the statute contains a number of important limitations . . . . By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.

These unambiguous teachings should have been dispositive in the present case. Instead, the court of appeals set off in a different direction, failed to comprehend the primacy of competitive effect in antitrust jurisprudence, and erected a standard that would penalize even procompetitive marketing activities.

4. The decision below also departs from this Court's guidance in an additional important respect. For at least 45 years, this Court has instructed that the Robinson-Patman Act "'should be construed consistently with broader policies of the antitrust laws.'" *Brooke Group*, 509 U.S. at 220 (*quoting A&P*, 440 U.S. at 80 n.13). *See Gypsum*, 438 U.S. at 458 (same); *Automatic Canteen*, 346 U.S. at 63, 74 (same). To be sure, there are points of "potential tension between the rationales underlying the Sherman and Robinson-Patman Acts." *Gypsum*, 438 U.S. at 450. But, the Robinson-Patman Act is not, as the Ninth Circuit concluded, invariably at war with the Sherman Act and the Clayton Act (of which it is a part). "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically curtail it . . . ." *Id.* (internal quotation omitted). Consistent with that premise, this Court has been attentive to "effect a partial

accommodation" between "the rationales underlying the Sherman and Robinson-Patman Acts" *(id.)* and to avoid interpretations that would "'give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'" *A&P*, 440 U.S. at 80 *(quoting Automatic Canteen*, 346 U.S. at 63).

The decision below collides with these directives. By precluding any consideration of the procompetitive effect of a defendant's pricing activities, the Ninth Circuit has contrived an abyss between the Robinson-Patman Act and other antitrust laws and has forbidden any bridge to span that gap. So clear a departure from this Court's prior cases strongly favors certiorari.

5. Underlying the Ninth Circuit's misinterpretation of the Robinson-Patman Act is a series of errors in statutory construction. Contrary to settled principles and to this Court's express guidance, the decision below does not give the words of the statute their ordinary meaning, does not give full effect to all words of the statute, and does not confer the same meaning upon the same word in different places in the statute. Through these errors in construction, the Ninth Circuit reached a result that thwarts the overriding purpose of the antitrust laws to promote competition.

"In determining the scope of a statute, we look first to its language." *Russello v. United States*, 464 U.S. 16, 20 (1983) (internal quotations omitted). *See Hubbard v. United States*, 514 U.S. 695, 703-04 (1995). Giving the words enacted by Congress "their ordinary . . . common meaning" *(Perrin v. United States*, 444 U.S. 37, 42 (1979)), it is clear that the requisite effect on competition must remain a relevant issue in a § 2(a)

case. The words of the pertinent portion of § 2(a) are instructive (15 U.S.C. § 13(a)):

> It shall be unlawful for any person . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . .

Under the decision below, once a plaintiff shows the existence of a price differential, that showing necessarily and irrevocably establishes injury to competition. But, that interpretation essentially reads out of the statute the words "where the effect of such discrimination may be substantially to lessen competition." *Id.* On a fundamental level, therefore, the Ninth Circuit's view contravenes the settled principle that a statute must be construed to give effect to all its parts. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 504 n.6 (1993) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute") (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) ("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). For the same reason, the decision below also contravenes the requirement that individual words and phrases in a statute must be read in the context of the whole act. *See Rubin v. United States*, 449 U.S. 424,

431(1981); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Richards v. United States*, 369 U.S. 1, 11 (1962).

Even if it were permissible to ignore the statutory language that expressly refers to effect on competition, the holding of the Ninth Circuit would still be incorrect. By its terms, § 2(a) reaches only conduct that may "injure, destroy, or prevent competition with any person . . ." 15 U.S.C. § 13(a). Using ordinary rules of grammar and statutory construction, the word "competition" cannot be disregarded. Necessarily, the entire phrase requires that the only relevant injury is injury to ***competition***. In the view of the Ninth Circuit, however, that critical word is mere surplusage: any injury -- by which the court means any price discrimination -- will suffice. But, "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979); *Garcia v. United States*, 469 U.S. 70, 79 (1984) (same); *Russello*, 464 U.S. at 23 (same).

Further buttressing the correct reading of § 2(a) as embracing competitive effect, is Congress's use of the word "injury." There is no mistaking the meaning of that word in the Clayton Act. As this Court has held with respect to § 4 of the Clayton Act, 15 U.S.C. § 15, injury means "***antitrust*** injury, which is to say injury of the type the antitrust laws were intended to prevent . . ." *Brunswick*, 429 U.S. at 489 (emphasis in original). *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). The word injury cannot have one meaning in § 4 and a different meaning in § 2(a) of the same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (rejecting interpretation "contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning");

Sorenson v. Secretary of Treasury, 475 U.S. 851, 860-61 (1986) (same).

Consistent with the correct view of the statutory language, this Court has held that "injury" in § 2(a) means injury to competition. *Brooke Group* leaves no doubt on that score. 509 U.S. at 220 (§2(a) reaches price discrimination "only to the extent it threatens to injure competition"). Contrary to this Court's clear pronouncement, the Ninth Circuit mistakenly confined *Brooke Group* to primary-line cases only. Under the decision below, Congress's use of the word "injury" has one meaning in a primary-line case and an entirely different meaning in a secondary-line case. No principle of statutory construction supports the Ninth Circuit's faulty conclusion. Moreover, nothing in the language or spirit of the antitrust laws justifies a holding that inhibits or penalizes procompetitive conduct. Because the Ninth Circuit reached a result that is contrary to Congress's stated objective, review by this Court is needed to restore a correct and uniform interpretation nationwide.

6. The issue presented in this case is not a mere academic curiosity; it has enormous practical ramifications. As a consequence of the decision below, competition will be impeded.[5]

The dilemma facing those involved in marketing and distribution is unavoidable. In the Third, Ninth and Eleventh Circuits, even price differentials that

---

[5] The deleterious economic implications of the views expressed in the Ninth Circuit opinion are addressed at length in the commentaries cited in the petition. Pet. 21-23.

promote competition are vulnerable to a claim for treble damages. In other regions of the country, a manufacturer will be permitted to defend the same pricing decision by showing that it has not harmed competition. Accordingly, corporate marketing officials and their counselors face a patchwork quilt of conflicting views. By way of illustration, consider the plight of manufacturers that distribute products on the East Coast. Traveling from north to south, these manufacturers would find that the recent pronouncements and holdings of the circuit courts leave it unclear whether any showing of competitive effect will be permitted in Maine, New Hampshire, Massachusetts, and Rhode Island *(compare Coastal Fuels with Monahan's Marine)*, but require consideration of effect on competition in Connecticut, Vermont and New York *(Hayden, Best Brands, Interstate Cigar)*, preclude just such consideration in Pennsylvania, New Jersey and Delaware *(Feeser)*, require consideration of effect on competition in the District of Columbia *(Boise Cascade)*, and preclude such consideration in Georgia, Alabama and Florida *(Alan's of Atlanta)*. *See supra* at 9-10 and nn.2-4. Manufacturers face the same puzzlement as their products move westward across the country and cases decided by the Fifth, Seventh, Eighth, Ninth and Tenth Circuits are taken into account. *See id.*

The dilemma is especially acute for manufacturers that sell to large nationwide accounts. In those circumstances, manufacturers ordinarily will not know whether their products will be distributed to locations where the draconian rule of the decision below governs. There will be inexorable pressure to forgo more competitive pricing strategies in favor of the highly restrictive regime mandated by an irrebutable

presumption of injury to competition. If firms that distribute products nationwide pull their competitive punches to accommodate the decision below, the overarching goals of the antitrust laws will be thwarted. This Court should therefore grant review to preclude that undesirable result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:
G. WILLIAM FRICK
HARRY M. NG
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8089

JERROLD J. GANZFRIED
Counsel of Record
WILLIAM R. O'BRIEN
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, DC 20005
(202) 783-0800
Attorneys for American Petroleum Institute

SEPTEMBER 1997

Supreme Court, U.S.
FILED
SEP 18 1997
CLERK

No. 97-307

In The

Supreme Court of the United States

October Term, 1996

OSRAM SYLVANIA PRODUCTS, INC.,

Petitioner,

vs.

CHARLES T. VON DER AHE and
CHROMA LIGHTING,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel of Record
BARRY R. LAUBSCHER

GRANT & LAUBSCHER, LLP
2030 Main Street
Suite 1600
Irvine, California 92614
Telephone: (714) 660-1600

*Attorneys for Respondents
Charles T. Von Der Ahe
and Chroma Lighting*

September 18, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Respondent Charles Von Der Ahe did business as "Chroma Lighting" for a period of time and later incorporated Chroma Lighting as a California corporation. The Respondents are collectively referred to herein as "Von Der Ahe." The action was brought against Petitioner, GTE Products Corporation, a Delaware corporation, and Sylvania Lighting Services Corporation, a Delaware Corporation. Sylvania Lighting Services has been dismissed and is not a party to this Petition. Contrary to the statement in Petitioner's Rule 29.1 listing, GTE Products Corporation has never been dismissed as a defendant. Both the published opinion (the "Opinion") and the unpublished Memorandum Opinion ("Memorandum"), as well as the District Court's Judgment, all of which are reprinted in the Appendix to the Petition, contain the correct caption. GTE Products' counsel, without seeking or obtaining leave of court, simply changed the caption on pleadings it filed to reflect what it says was "merely a name change."*

RULE 29.1 LISTING

Pursuant to Rule 29.1 Respondents hereby state that:

Respondent Chroma Lighting is a closely held California corporation that has issued no shares to the public.

---

* In an attempt to avoid confusion, Respondents will refer to the Petitioner as either "Petitioner" or "Sylvania" hereinafter.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

RULE 29.1 LISTING i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

A. The Robinson-Patman Act Itself Dictates The Result Reached By The Lower Courts 6

B. The Legislative History Clearly Establishes That Robinson-Patman Was Aimed At Protecting Competitors 9

C. There Is No Conflict Among The Courts Of Appeals 11

D. Sylvania Has Shown No Error Committed By The Lower Courts 14

E. Sylvania's Evidence Was Not Sufficient To Establish The Absence Of A Reasonable Possibility Of Injury To Competition 16

F. *Brooke Group* Should Not Be Extended To Secondary-Line Price Discrimination Claims .. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 10, 13, 19, 20

Boise Cascade Corp. v. FTC, 387 F.2d 1127 (D.C. Cir. 1988) 11, 12, 13, 17, 20

In re Boise Cascade Corp., 113 FTC 956 (1990) 12

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 6, 18, 19

Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir.), cert. denied, 117 S. Ct. 294 (1996) 15, 16, 19

Falls City Indus., Inc. v. Vanco Beverage Co., 460 U.S. 428 (1983) 7, 16

FTC v. Morton Salt, 334 U.S. 37 (1948) ..... *passim*

J.F. Feeser, Inc. v. Serv-A-Portion, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 488 U.S. 921 (1991) 10, 11, 12

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989) 9

Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995) 19

Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267 (3d Cir. 1995) 19

STATUTES

15 U.S.C. § 13(a) (1936) 1, 6

15 U.S.C. § 15 (1914) 21

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L.J. 327 (1994) 19

Kenneth L. Glazer, *Predatory Pricing and Beyond: Life After Brooke Group*, 62 Antitrust L.J. 605 (1994) 20

Isabel Paterson, *The God of the Machine* (1943) 8

Stern and Gressman, *Supreme Court Practice* (7th ed. 1993) 2

STATEMENT OF THE CASE

The Petition is a thinly veiled attempt to invite this Court to rewrite the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (1936) ("Robinson-Patman" or "RPA"), and to summarily reverse six decades of well-established Robinson-Patman jurisprudence.

In order to achieve its desired result, Sylvania attempts to create a conflict among the Circuits which simply does not exist. No Circuit espouses the rule that Sylvania urges this Court adopt.

The Petition also attempts to camouflage the fact that Sylvania was not precluded by the District Court (Judge William D. Keller) from introducing evidence in an attempt to establish that there was "no injury to competition." Both the jury and Judge Keller rightfully rejected Sylvania's evidence. (Petition, 5 and 6; Opinion, 4a.)[1] The Circuit Court did not address the question of whether Sylvania's evidence was sufficient, as a matter of law, to establish no reasonable possibility of injury to competition, but rather determined such evidence was not relevant in light of the proof of actual harm to Von Der Ahe.

---

[1] Citations to the Reporter's Transcript are designated as "RT," and trial exhibits are noted as "EX." The Circuit's published opinion is referred to as the "Opinion" and its unpublished memorandum is referred to as the "Memorandum." They will be referred to by the page number in Sylvania's Appendix, where they have been reprinted.

Sylvania did not seek a rehearing on that issue. Instead, Sylvania paints a rosy picture of competitive health which is not supported by the record, as will be demonstrated herein.[2]

---

[2] Absent a determination in favor of Sylvania on this issue (no "injury to competition"), Von Der Ahe would still prevail (and Sylvania would lose) even if this Court were to determine the Question Presented favorably to Sylvania. Sylvania failed to request the Circuit to address this antecedent question in its request for rehearing, and failed to include the issue here. (The reason for these omissions will become obvious when that evidence is examined *infra*.) Therefore, a serious question is raised concerning the justicability of the Question Presented. *See* Stern and Gressman, *Supreme Court Practice* (7th ed. 1993) at 172-73, and authorities cited therein.

1. *Factual Background.*[3] Von Der Ahe became an exclusive[4] distributor of Sylvania lighting products (*i.e.*, light bulbs: fluorescent, incandescent, mercury vapor, etc., referred to in the industry as "lamps"), serving the Southern California area, in October of 1987. (EX 90.) Sylvania, North American Philips ("Philips") and General Electric ("GE") accounted for 86.5% of the lamp market.

---

[3] Von Der Ahe disagrees with most factual statements made by Sylvania. Some statements are half-truths with some support in the record. Others are patently false. For example, at p. 4 Sylvania states "Von Der Ahe entered the market with virtually no business experience, a superficial acquaintance with complex lighting products, and an initial investment of $33,000." In fact, Von Der Ahe had majored in Business at USC, which he attended for four years, had prior experience working as a salesman for a lamp distributor and eventually invested over $268,000 into the business. (RT 1267; EX 10147.) Another example appears at page 4 where Sylvania states "41 firms entered the market and prospered." "Entry" was defined as having no sales of Sylvania lamps in 1988. Thus, Redlands Camera, with $1000 in sales in 1987, no sales in 1988, and $412 in 1990 was classified an entrant. Even more egregious is Sylvania's classification of Summer Electric as an entrant. Summer dropped another manufacturer's line and became a Sylvania distributor in 1991, achieving over $2,000,000 in sales. Using a different and more narrow definition there were also 22 exits. (EX 4669 pp. 120-23, 5127.) There was no evidence offered by Sylvania as to the financial health of any distributor and there is simply no basis to conclude that they "prospered." Von Der Ahe incorporates the facts as set forth in the Opinion and Memorandum rather than detail *ad nauseam* Sylvania's numerous misstatements.

[4] In its Petition at p. 4, Sylvania asserts most distributors represented multiple manufacturers. This is an incorrect statement and is not supported by the record.

(EX 4669:80-81.) Sylvania was the predominant manufacturer in Southern California with a 42.7% market share. (EX 4669:78.)

Regency Lighting ("Regency") was Von Der Ahe's main competitor. Like Von Der Ahe, Regency was a "lighting specialist;" that is, Regency specialized in lamps, and unlike the majority of other Sylvania distributors did not sell other electrical supplies. (RT 3234; 3241-2.) During the relevant time, there were only 12 lighting specialists in Southern California. (RT 2534-37.) Not all of those 12 distributors specialized in the industrial commercial market (office buildings, hotels, retail chains, etc.) as did Von Der Ahe and Regency. (EX 5124.) Sylvania gave a host of secret rebates, special credit terms and pricing deals to Regency. In 1987, the year Von Der Ahe began business, Regency's sales were $1,953,000. By 1991, as a result of price discrimination, Regency's sales swelled to $7,644,705. (EX 10337.) In the industrial/commercial segment, Regency accounted for 17.29% of total sales. (EX 5124.)

West-Lite was another lighting specialist and competitor of Von Der Ahe. It also received discriminatory pricing and secret rebates, including guaranteed profits. (EX 365.) Its sales increased sevenfold from 1989 to 1994. (EX 10337.)

Sylvania's discrimination took many forms and was much more than "simply volume discounts," as characterized in the Petition at p. 5. In fact, while Von Der Ahe and other Sylvania distributors had to purchase 11,000 cases of lamps to get the maximum volume discount of 14.5%, Regency received a 14.5% "volume discount" on

orders in excess of 15 cases. (EX 164.) Regency was also the recipient of special financing (EX 10324; 4667), loans (RT 1550-52; EX 10171), and was paid discriminatory rebates. (EX 521, 529.)

Sylvania created elaborate stratagems to conceal its discriminatory prices and lied outright to Von Der Ahe and other distributors. (RT 2744; 5505-06.) Sylvania's employees fabricated spurious and false documents to concoct non-existent price competition from competitors. (RT 2786-87, 2825, 3324-28, 3704; EX 94, 123, 137, 154, 10376.) Upon discovering these violations of the law by its employees, Sylvania did not punish them, but instead rewarded them by paying substantial bonuses. (EX 107, 200, 337.) Sylvania's conduct was so reprehensible that the jury awarded punitive damages on Von Der Ahe's tort claims. While the trial judge reduced the amount of punitive damages, he did so only after determining Von Der Ahe had met his burden of proof on each and every element entitling him to punitive damages by the "clear and convincing" standard applicable in California.

During trial, Von Der Ahe introduced substantial evidence that he lost sales and profits, and demonstrated the failure of his business was the direct result of Sylvania's price discrimination. Von Der Ahe testified to specific instances where lower prices offered by the favored distributors caused him to lose business, or forced him to reduce his price to keep the customer. Von Der Ahe's testimony was corroborated by customers. (Opinion, 4a, Memorandum, 17a; RT 2155, 2156, 1728, 1730-31, 2146-2147, 2151-2152.)

REASONS FOR DENYING THE PETITION

The Petition should be denied because the Ninth Circuit's decision is consistent with the Robinson-Patman Act, its legislative history and decades of this Court's jurisprudence; moreover, it does not conflict with the decisions of any other Circuit. Sylvania has failed to rebut any inference of injury to competition (under any definition). Finally, this Court should not extend the reasoning of its decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) to secondary-line price discrimination suits.

A. The Robinson-Patman Act Itself Dictates The Result Reached By The Lower Courts.

The Robinson-Patman Act in relevant part provides as follows:

> It shall be unlawful for any person . . . to discriminate in price . . . where the effects of such discrimination ***(1)*** may be substantially to lessen competition *or* ***(2)*** tend to create a monopoly in any line of commerce, *or* ***(3)*** *to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.* [Clayton Act, as amended by Robinson-Patman Antidiscrimination Act, 15 U.S.C. Section 13(a) (1936).] [Emphasis and boldfaced numbering added.]

The numbered items are commonly referred to collectively as the "injury to competition" element. It is obvious Congress intended this element to be achievable in three different ways ("paths"). Von Der Ahe utilized

the inference approved by this Court in *FTC v. Morton Salt*, 334 U.S. 37, 49-50 (1948) to satisfy this element via the "first path." In sum, he proved there was a substantial price difference in favor of those he competed with over time. (Memorandum, 17a-18a.) Von Der Ahe does not contend, and the Opinion of Justices Norris, Browning, and Reinhardt does not hold, that *this* inference is irrebuttable as Sylvania portrays. This Court's decision in *Falls City Indus., Inc. v. Vanco Beverage Co.*, 460 U.S. 428, 435 (1983) is controlling:

> *In the absence of direct evidence of displaced sales,*[5] this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits. [Emphasis added.]

However, Von Der Ahe did not stop after successfully invoking the *Morton Salt* inference. He also proceeded along the "third path" and established that he lost sales and profits. (Opinion, 4a, Memorandum 17a-18a.) This proof is irrebuttable (because it establishes the injury to competition element via the "third path" provided by Congress) and no Circuit examining this issue has ever held to the contrary. (Discussed *infra*.)

Sylvania ignores the "third path" and instead attacks the draftsmanship of the RPA, referring to it as the "black sheep" and a "Fifth Columnist" in the otherwise clear and well-settled law of antitrust. The argument proves too much and ignores the clear legislative history of the RPA – it *was* intended to protect competitors and not

---

[5] This critical prefatory phrase is conspicuously absent from Sylvania's discussion of *Falls City*. (Petition, at p. 17.)

necessarily to be in harmony with legislation enacted two decades earlier.[6]

Sylvania makes a feeble attempt to evade the plain language of the "third path" by invoking the "canon of statutory construction" to the effect that same words in different parts of the same statute are to be given identical meanings. In essence, Sylvania asserts that "path three" adds nothing to the statute and merely complements "path one." Sylvania thus ignores the twenty-two year passage of time between enactment of the Clayton Act and its RPA amendment, as well as the rich and express legislative history to the contrary. Sylvania also turns a blind eye to the reality that words used in different contexts can have different meanings. The word "competition" in "path one" obviously can have a different connotation than the phrase "prevent competition *with*" as used in "path three."[7] Interpreting this same phrase, the First Circuit has already illustrated this point:

> That single word "with" makes a considerable practical difference. It means that the Act protects *those who compete* with a favored seller, not

---

[6] It has been said, "As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid." Isabel Paterson, *The God of the Machine*, (1943). If the RPA could speak in its own defense against Sylvania's attacks, it could validly claim to be a victim of "guilt by association."

[7] The English language abounds with words that have different meanings and connotations depending upon context. For some amusing examples visit the following web sites: http://www-personal.umich.edu/~cellis/antagonyym.html (discussing "antagonyms") and http://www-personal.umich.edu/~cellis/heteronym.html (discussing "heteronyms"). Were it not so, George Carlin would be flipping hamburgers.

> just the overall competitive process. [Emphasis in original.]

Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.). To give "path three" no meaning would eviscerate the RPA and completely subvert the manifest intent of Congress.

B. The Legislative History Clearly Establishes That Robinson-Patman Was Aimed At Protecting Competitors.

Brevity forecloses an extensive review of the legislative history of the RPA here. The Circuit Court discusses it briefly in the Opinion. (Opinion, 6a-9a.) This Court also examined and extensively quoted from Senate Judiciary Committee hearings in *FTC v. Morton Salt, supra*, 334 U.S. at 49-50 (fn. 18) and concluded:

> The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."[8]

---

[8] Many courts, commentators, and attorneys have referred to this quote as the holding of *Morton Salt*. Some refer to it as the "*Morton Salt* inference." *See, e.g.*, the Petition at pages 2 and 9, and the Opinion at 13a. If this is so, then there are two *Morton Salt* inferences and holdings: the above (the "former"), and that the FTC "could infer the requisite injury to competition from proof of sales to competing buyers entailing a substantial price difference over time. *Id.* at 50." (Quoting the Petition at page 16.) (The "latter.") Since *Morton Salt* was brought by the FTC (not an injured competitor) and there does not appear to be direct evidence of lost sales or profits by any competitors, it would appear that the latter and not the former are the true holding

The Third Circuit, in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir.1990), cert. denied, 499 U.S. 921 (1991), examined RPA legislative history and concluded Congress intended "to outlaw price discrimination that tends to injure competitors, rather than competition in general. . . . " (*Id.*, at 1533.) Similarly, in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418, n.6 (11th Cir. 1990), after summarizing a half century of RPA secondary-line jurisprudence, the Eleventh Circuit concluded: "The legal focus of the competitive injury inquiry is on the competitor, not the consumer. For section 2(a) purposes, whether or not output is restricted or prices are raised simply is not dispositive." (*Id.*, at 1418 n.6.)

Sylvania asks this Court to ignore the statutory language, the legislative history and well-established jurisprudence, and instead rewrite the RPA to make consumer harm the focus. The RPA is an antidiscrimination statute dwelling within an antitrust statute. It is much more akin to the Unfair Practice Acts enacted in many states in the same era with the objective of eliminating what were

---

(note 8 continued) and/or inference. The former seems to be strong *dicta* interpreting the Robinson-Patman's injury to competition element as being established, not inferred, by proof of injury to a competitor. Which is the definitive holding and/or inference may not matter as long as care is taken to determine which proof (injury to a competitor or substantial discrimination over time) is before the court when analyzing cases, especially in attempting to determine if there is a conflict. Of course, referring to the former as an inference creates an oxymoron – "irrebuttable inference." In this Opposition the "*Morton Salt* inference" is intended to mean the latter.

perceived to be unfair business practices, to ensure fairness and a level playing field and to protect small businesses. Trying to reconcile economic theory applicable to antitrust law with such legislation is like trying to pound a square peg into a round hole.

C. There Is No Conflict Among The Courts Of Appeals.

Sylvania relies almost entirely upon *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988) to create a conflict with the Ninth Circuit Opinion and the *Feeser* and *Alan's of Atlanta* decisions.[9] (Petition, 19-21.) This reliance is misplaced. *Boise Cascade*, like *Morton Salt*, involved a situation were the Court reviewed an FTC decision finding a violation of the RPA. There was no private plaintiff. The Commission relied on the *Morton Salt* inference. *Id.* at 1128. The Commission did not rely on evidence of injury to a specific competitor in the form of displaced sales or profits.

Boise Cascade, seeking to rebut the *Morton Salt* inference, marshaled considerable industry-specific data relating to its competitors to establish those competitors had suffered no competitive harm.[10] This evidence focused

---

[9] Sylvania also refers to *dicta* of other Circuits and District Courts in its extensive footnote 28, as well as an earlier decision of the Ninth Circuit in footnote 7. Since *dicta*, district court decisions and overruled decisions cannot create conflicts in the Circuits, they will not be discussed here. Suffice it to say, Von Der Ahe disagrees with Sylvania's characterization of the *dicta* and asserts these cases do not support Sylvania's position.

[10] This evidence will be described in some detail hereinbelow because it graphically illustrates by comparison the extreme weakness of Sylvania's rebuttal evidence.

entirely on the competitive health of selected competitors of Boise, not consumer injury. *Id.* at 1135.

In its opinion, the D.C. Circuit noted the FTC waived aside this evidence that competition among dealers was healthy, that selected dealers singled out for FTC examination were thriving, and that this happy picture of prosperity was apparently unclouded by instances of diverted sales. "The Commission flatly concluded that this entire body of evidence was *irrelevant*." *Id.*, at 1143-1144. [Emphasis in original.]

Boise clearly falls within the holding of *Falls City* since there was no evidence of displaced sales or lost profits by any particular competitor. The D.C. Circuit held that the FTC should have considered this evidence and reversed and remanded back to the FTC for reconsideration. Importantly, it did not hold that Boise's evidence rebutted the *Morton Salt* inference (substantial discrimination over time) as a matter of law and, indeed, upon remand the FTC determined the evidence was insufficient and upheld its earlier determination. *In re Boise Cascade Corp.*, 113 FTC 956 (1990).

Boise Cascade does not conflict with the instant case because *Boise* did not involve an injured competitor with proof of displaced sales and lost profits. The FTC relied upon the *Morton Salt* inference solely to meet the "injury to competition" element. *Boise* does not conflict with *Feeser* (injury to the competitor discussed at 909 F.2d

1535-1538), nor *Alan's of Atlanta*,[11] and neither of them attempts to distinguish the earlier *Boise* decision. It is only by confusing the *Morton Salt* inference with the "third path" that any misunderstanding can occur.

Any argument Sylvania may have that *Boise* did more than what is stated above is put to rest by the following statement of the majority at page 1163, fn. 16:

> The charge, with all respect, is quite unfounded. To the contrary, we have steadfastly adhered to traditional principles of Robinson-Patman law in concluding that the *Morton Salt* inference was properly relied upon here to establish a *prima facie* case of competitive injury. In light of the Commission's success in this respect, the burden therefore shifted to Boise to rebut the FTC's *prima facie* case by breaking, if it could, the "causal connection." Our quarrel with the Commission, and now with our colleague, is that *the FTC proceeded deliberately to ignore the wealth of evidence submitted by Boise, including fact-specific evidence going directly to the Commission-annointed "victims,"* namely the selected dealers. [Emphasis in original.]

The *Boise* court expressly refused to undergo the Sherman Act or Clayton Act analyses that Sylvania urges

---

[11] In its haste to create a conflict between the Circuits, Sylvania may have overstated the holdings of *Feeser* and *Alan's of Atlanta*. Both arose in the context of the review of summary judgment motions and do not address the precise question dealt with in the Opinion. While both cases hold injury to competitors is the appropriate inquiry, the question of rebuttal is not addressed. If this is the case, Sylvania's conflict theory is even more flawed.

this Court to require in secondary-line RPA cases. *Id.* at 1163. Furthermore, by implicitly agreeing that presenting evidence of no harm to individual competitors is a proper way to rebut the inference created by discrimination over time, instead of indicating the appropriateness of Certiorari, *Boise* actually buttresses the Opinion.

D. Sylvania Has Shown No Error Committed By The Lower Courts.

Sylvania was not precluded from presenting evidence to attempt to prove that competition was not injured, nor from presenting evidence to break the causal link between its discriminatory practices and the actual injury suffered by Von Der Ahe. In fact, Sylvania's economist, Keith Ugone, spent three days testifying in a vain attempt to accomplish this. A substantial part of the testimony of Dr. Gerhard Rostvold, Von Der Ahe's economist, was devoted to rebutting the evidence put forth by Dr. Ugone.

At p. 5 of its Petition, Sylvania states: "the trial judge instructed the jury that it could infer injury to competition from proof that one of Mr. Von Der Ahe's competitors received a substantial discount." The instruction also allowed the jury to conclude the same from proof of lost sales or profits, and went *on* to state: "This inference may be overcome by evidence which you find breaks the causal relationship between a price differential and lost sales or profits."[12] (RT at 6648.)

---

[12] If anything, the District Court's instruction erred in favor of Sylvania by allowing it to attempt to rebut a finding of injury to competition in the face of actual harm to Von Der Ahe.

Sylvania, in fact, *received* the instruction that it would urge this court to adopt, *i.e.*, that it could rebut a finding of harm to competition even where that finding was based upon actual proof of lost sales. Thus, even if this Court were to answer the Question Presented favorably to Sylvania, there is no reversible error.

Sylvania can only prevail if its rebuttal evidence was so strong that, as a matter of law, it overcame any inferences or presumptions (assuming it had the right to rebut). *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 79 F.3d 182, 194, (1st Cir.), cert. denied, 117 S. Ct. 294 (1996). Sylvania argued exactly this in its post-trial motions and lost. It raised the same argument in the Circuit Court, which declined to address the question, instead holding that such rebuttal should not have been permitted in view of evidence establishing lost sales and profits. Sylvania did not ask for the issue to be addressed in its Petition for Rehearing and has not raised it in its present Petition.

This raises serious questions regarding the justicability of the Question Presented. (*See* footnote 2, *supra*.) Absent a determination that Sylvania's evidence overcame any inference, Von Der Ahe prevails no matter how the Question Presented is answered. Certainly Von Der Ahe has an interest in the Question Presented but his primary objective is recovering for *his* injury and not paving the way for future RPA plaintiffs.

(note 12 continued) (Moreover, Sylvania did not properly preserve any objection to this instruction and did not raise an objection to it on appeal.)

The Question Presented would be better deferred to a case where this Court's determination really mattered. Such cases would include the situation where the jury instruction did not allow the broad rebuttal permitted Sylvania, or where evidence was precluded, or where the lower courts have found the rebuttal evidence sufficient as a matter of law. If such a case does not arise, perhaps the issue is not that important after all.

The obvious reason that Sylvania chose not to petition for rehearing on this issue, and has not raised it here, is that it would have been virtually frivolous to do so as will be discussed next.

E. Sylvania's Evidence Was Not Sufficient To Establish The Absence Of A Reasonable Possibility Of Injury To Competition.

As Sylvania acknowledges, and as relied upon by the Circuit Court, Von Der Ahe proved his *prima facie* case using not only the *Morton Salt* inference, but also evidence of actual lost sales and profits. Assuming, for the sake of argument, Sylvania could rebut both of these showings, it would have the burden of persuading a reviewing court that its evidence so conclusively pointed to a verdict in its favor that fair-minded people could not disagree.[13] *Coastal Fuels, supra* 79 F.3d at 194.

---

[13] In *Fall Cities Indus., supra* 460 U.S. at 435, the court indicated that the *Morton Salt* inference may be rebutted in the absence of direct evidence of lost sales, thereby suggesting direct evidence to a competitor may not be overcome.

Sylvania failed to carry its burden. As mentioned above, *Boise Cascade* graphically illustrates the shortcomings of Sylvania's evidence. Sylvania failed to perform anything approaching the comprehensive analysis offered by *Boise Cascade* to rebut the inference of competition. There was no evidence of the gross profit margins for any of the distributors other than Von Der Ahe, Regency and West-Lite. Both Regency and West-Lite enjoyed profit margins of approximately 30%. (EX 413 and 414). On the other hand, Von Der Ahe's gross profit margin during the last year of operations was a paltry 22%. (EX 10136.)

The *Boise* expert found a steady rise in the number of dealers in the industry, and found that all 18 of the dealers selected for analysis had enjoyed an increase in sales during the time in question, that overall annual growth was in excess of 22% and the virtual absence of lost sales traceable to the price differential. (*Id.* at 1135.)

In this case, Sylvania's expert undertook no such detailed analysis and made no such conclusions. Ugone did not differentiate between electrical distributors, lighting specialists, or lighting maintenance companies. He counted "retailers" as "distributors" and each separate outlet of the same retailer as multiple distributors. He did not define the relevant market – geographic or product. He did not analyze the impact of the pricing mechanisms on individual distributors, nor did he compare various prices given to various distributors. (RT 4421-22, 4429.) He did not interview any competitors, nor examine their financial condition. (RT 4426, 4428.) He did not conduct a study as to why customers changed distributors. (RT 4462.) He did not include discounts and rebates in his comparisons. He did not analyze lamp prices to end-

users for the period in question or afterward. (RT 4370-72.) In short, Ugone failed to conduct the kind of analysis required to overcome the causal connection between price differences and lost sales or profits.

Though not required to, Von Der Ahe's expert introduced evidence showing a substantial increase in the market share of those distributors receiving the benefits of discriminatory pricing. Large distributors (with sales in excess of $1 million) saw their market share increase from 44% in 1987 to 61.8% in 1991. (EX 10365.) This increase was at the expense of small distributors. Notably, Regency and West-Lite (the primary beneficiaries of Sylvania's discriminatory practices) accounted for 90.5% of the increase in the volume of sales for the large distributors. (EX 10366.) Other evidence suggests cooperation between Sylvania and Regency to maintain high margins. (EX 409).

Finally, although Sylvania asserts there was no injury to consumers, it failed to introduce any evidence to support this naked assertion. No Phoenix will rise from the ashes of the record Sylvania has created here, under any scrutiny imaginable.

F. *Brooke Group* Should Not Be Extended To Secondary-Line Price Discrimination Claims.

Von Der Ahe believes the reasons for not extending *Brooke Group* to secondary-line price discrimination cases have already been demonstrated. While a few commentators speculate this Court may eventually extend its reasoning in a primary-line predatory pricing case to secondary-line RPA cases, none has argued the legislative

history and well established jurisprudence support such a result.[14]

Each Circuit Court considering the issue to date has refused to extend *Brooke Group* beyond primary-line predatory pricing cases. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995) (prior to the instant case); *Coastal Fuels, supra*, 79 F.3d at 191-93 (relying on the "third path" language added by the RPA, the legislative history, and language in *Brooke* limiting its holding to primary-line predatory pricing cases.) *See also Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995) (applying *Morton Salt* without discussing *Brooke Group*).

Judge Eschbach, advocating judicial restraint in *Alan's of Atlanta, Inc., supra* 903 F.2d, aptly comments at p. 1418, n.6:

> For the time being we are satisfied merely to make it clear that when confronted with contemporary economic argument on the one hand and judicial precedent on the other, we feel, unlike those of a more activist bent, *see e.g. R. Bork, supra*, at 36, that economic argument is not ultimately controlling; judicial precedent is.

Kenneth L. Glazer, counsel for Liggett Group, Inc. in *Brooke Group*, has expressed the same sentiment:

---

[14] Professor Calkins, in fact, found the *Brooke Group* decision "no more satisfying" than the appellate litigation preceding it. Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L.J. 327, 403 (1994).

> "It is fairness, as Congress perceives it, that Robinson-Patman is all about." This differing treatment is not without support of the legislative history of the two causes of action. The primary-line case existed under the original 1914 Clayton Act prohibition of price discrimination. The Robinson-Patman Act was enacted with secondary-line injury in mind.

Kenneth L. Glazer, *Predatory Pricing and Beyond: Life After Brooke Group*, 62 Antitrust L.J. 605, 632-633 (1994) (quoting, in part, from *Alan's of Atlanta* which in turn was quoting from *Boise Cascade*).

It is abundantly clear that Congress was not focusing on primary-line cases when it enacted Robinson-Patman. Congress' focus was on small businesses. It is difficult to imagine a less likely intended beneficiary of Congress' action than Brooke Group, Ltd. with its meager share (12%) of the tobacco market.

While there will no doubt be a phalanx of amicus briefs submitted in support of Sylvania's plea to rewrite the Robinson-Patman Act, Von Der Ahe respectfully submits those briefs should instead be directed to Congress and the state legislatures which have enacted unfair competition laws prohibiting the type of conduct giving rise to the district court action below.

It no doubt is costly for big business to monitor for fairness in the manner in which competitors are treated. However, substantial costs are incurred by pharmaceutical companies in obtaining FDA approval to test and market drugs. The Congress is empowered, and is in a much better position than the courts, to evaluate whether or not benefits are outweighed by costs in determining

what legislation to pass, repeal, or modify. When the courts allow personal views, economic or otherwise, to determine which laws to enforce and which to ignore, they are on a slippery slope indeed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. Respondents request that they be awarded their costs as well as their attorneys' fees on appeal as provided for in 15 U.S.C. § 15.

Respectfully submitted,

Counsel of Record
BARRY R. LAUBSCHER

GRANT & LAUBSCHER, LLP
2030 Main Street
Suite 1600
Irvine, California 92614
(714) 660-1600
Attorneys for Respondents

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 97-307

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS, INC.,

Petitioner,

v.

CHROMA LIGHTING AND CHARLES VON DER AHE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

Of Counsel:
DALE R. SCHMIDT
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
1300 North 17th Street,
Suite 1847
Rosslyn, Virginia 22209
(703) 841-3280

TIMOTHY B. DYK
(Counsel of Record)
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus Curiae

25 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

The National Electrical Manufacturers Association ("NEMA") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused consent.

NEMA is the largest trade association in the United States representing the interests of electrical industry manufacturers. It has 550 member companies that manufacture products used in the generation, transmission and distribution, control, and end-use of electricity.

The rules of law governing interpretation of the Robinson-Patman Act and the other antitrust laws are of vital importance to NEMA. The Ninth Circuit decision below — which holds that a defendant in a Robinson-Patman Act case may not rebut the inference of harm to competition by showing that the relevant market is vigorously competitive — conflicts with this Court's precedents and, if allowed to stand, will impair competition and frustrate important antitrust objectives.

Because of its members' significant experience complying with rules dictating how sales programs can be designed and implemented, the *amicus* brings a unique perspective to this case. As the attached brief demonstrates, decisions like the one below have created considerable confusion for companies attempting to comply with the antitrust laws, as different standards of liability now apply in different jurisdictions. If the Ninth Circuit's rule in this case is allowed to stand, electrical industry manufacturers will be forced to tailor their sales programs depending on the jurisdiction, and to follow a standard of liability, in the Ninth Circuit and elsewhere, that affirmatively inhibits legitimate price competition.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

Of Counsel:
DALE R. SCHMIDT
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
1300 North 17th Street,
Suite 1847
Rosslyn, Virginia 22209
(703) 841-3280

TIMOTHY B. DYK
(Counsel of Record)
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus Curiae National Electrical Manufacturers Association

Dated: September 19, 1997

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 6

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION WHETHER A DEFENDANT MAY SEEK TO REBUT THE *MORTON SALT* INFERENCE OF HARM TO COMPETITION 7

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *BROOKE GROUP* AND OTHER CASES 10

III. THE NINTH CIRCUIT'S DECISION WILL BROADLY AFFECT MANUFACTURERS OF ELECTRICAL AND OTHER PRODUCTS AND IMPAIR COMPETITION 15

A. The Ninth Circuit's Decision Will Frustrate Important Antitrust Objectives 15

B. The Confusion Created By The Circuit Court Conflict Adversely Affects Competition 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 8, 10
Albrecht v. Herald Co., 390 U.S. 145 (1968) 13
American Football League v. National Football League, 27 F.R.D. 264 (D.Md. 1961) 18
Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328 (1990) 12
Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953) 11, 12, 15
Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988) 2, 6, 8, 12
Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993) 2, 6, 11
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) . . . 12
Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) . . . 12
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 13
Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 13
FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) . . . 15, 16
FTC v. Morton Salt Co., 334 U.S. 37 (1948) . . . 2, 3, 6, 12
Falls City Indus., Inc. v. Vanco Beverage, Co., 460 U.S. 428 (1983) 12
Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) 6
George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929) 11
Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 12
Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69 (1979) 8, 11, 12

TABLE OF AUTHORITIES
(Continued)

Page

Interstate Cigar Co., Inc. v. Sterling Drug, Inc., 655 F.2d 29 (2d Cir. 1981) 9
J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) 5, 10
Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 15
Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985) 9
Northern Pacific Ry. v. United States, 356 U.S. 1 (1958) 13
Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 3
Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 9
Standard Oil v. FTC, 340 U.S. 231 (1951) 12
State Oil Co. v. Khan and Khan & Associates, Inc., 93 F.3d 1358 (7th Cir. 1996) *cert. granted*, 65 U.S.L.W. 3567 (Feb. 18, 1997) (No. 96-871) 13
Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990) 12
Thill Securities Corp. v. New York Stock Exchange, 283 F.Supp. 239 (E.D. Wis. 1968) 18
United States v. United States Gypsum Co., 438 U.S. 422 (1978) 12

STATUTES

15 U.S.C. § 13(a) (1988) . . . . . *passim*
§ 13(f) 8
§ 15(a) 17
28 U.S.C. § 1331 4
§ 1332 4
§ 1337 4

TABLE OF AUTHORITIES
(Continued)

Page

LEGISLATIVE MATERIALS

80 Cong. Rec. 3447 (1936) 14
80 Cong. Rec. 6622 (1936) 14
Hearings Before the House Comm. on the Judiciary on the Judiciary on Bills to Amend the Clayton Act., 74th Cong., 1st Sess. 144 (1935) 14
H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936) 14
S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) 14

MISCELLANEOUS

P. Areeda & H. Hovenkam, III *Antitrust Law* ¶ 721 (1996) 13
P. Areeda, *Antitrust Analysis* (2d ed. 1974) 16
H. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113 (1983) 3, 16
P. Larue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired*, 48 S.M.U L. Rev. 1917 (1995) 8, 11
R. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* (1976) 7
F. Rowe, *Price Discrimination under the Robinson-Patman Act* (1962) 3, 8, 14
H. Shniderman & B. Leverich, *Price Discrimination in Perspective* (1987) 7
Wegenar, *9th Circuit Decision Invites High Court To Resolve Circuit Split on Rebuttability Of Competitive Injury Inference Under Robinson-Patman Price Discrimination Act*, Nat'l L.J. (May 19, 1997) . . . 8

STATEMENT OF INTEREST[1]

The National Electrical Manufacturers Association ("NEMA") is the largest trade association in the United States representing the interests of electroindustry manufacturers. Founded in 1926 and headquartered in Rosslyn, Virginia, its 550 member companies manufacture products used in the generation, transmission and distribution, control, and end-use of electricity. Annual shipments of these products total over $100 billion.

As an association that represents manufacturers of end-use of electricity products, NEMA has a vital interest in legal questions affecting competition in the lighting product industry, and in promoting uniform and consistent interpretation of the antitrust laws which directly affect the health of the lighting industry and the welfare of American consumers.

The legal and practical consequences of the Ninth Circuit decision are of grave concern to NEMA and its member companies. In holding that the defendant in a secondary line price discrimination case may not rebut an inference of harm to competition by showing that the relevant market is vigorously competitive, the Ninth Circuit has turned on its head the very purpose of the antitrust laws, to promote competition. NEMA seeks to provide this Court with the unique perspective of its broad-based constituency on this important federal question.

As discussed in Section III below, the decision of the Ninth Circuit in this case, unless reviewed and reversed by this Court, will have serious adverse consequences for the electrical and other manufacturing industries.

---

[1] Counsel for the *amicus curiae* has provided legal services to the petitioner, a member of the National Electrical Manufacturers Association, in connection with this case, and has been compensated for those services. Counsel relied on that prior work in preparing this *amicus* brief. Apart from this, no counsel for any party had any role in authoring this brief, and no person other than the named *amicus curiae*, its members, or its counsel made any monetary contribution to its preparation and submission.

INTRODUCTION AND STATEMENT OF FACTS

This case presents a fundamental question about the nature of the competitive injury requirement necessary to establish a claim of price discrimination under the Robinson-Patman Act. By its terms, that Act prohibits price discrimination only where the discrimination may reduce "competition" in some relevant market. 15 U.S.C. § 13(a) (1988). In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court held that evidence of harm to an individual *competitor*, under certain circumstances, can support an inference of the necessary harm to *competition*. *See id.* at 50-51. This case presents the question whether a defendant may rebut that inference with evidence of vigorous marketwide competition.

A panel of the United States Court of Appeals for the Ninth Circuit (Norris, Reinhardt, and Browning, JJ.) held that the *Morton Salt* inference of competitive injury is irrebuttable. In effect, the court of appeals replaced the statutory requirement of harm to "competition" with a judge-made requirement of harm to an individual competitor. Notwithstanding this Court's recent holding that "the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition," *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 209 (1993), the Ninth Circuit reasoned that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." Pet. App. 5a. The court of appeals acknowledged a directly applicable circuit split, and it expressly declined to follow (among other cases) the District of Columbia Circuit decision in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988). Pet. App. 5a.

1. As amended by the Robinson-Patman Act, Section 2(a) of the Clayton Act makes it unlawful (with qualifications not relevant here) for a seller to engage in price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who

either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a). By its terms, the Robinson-Patman Act thus covers price discrimination that may substantially lessen or prevent "competition" (or may tend to create a "monopoly") in any of three different markets: in the seller's own market (a so-called "primary-line" injury); in a downstream market where the disfavored customer competes (a so-called "secondary-line" injury); or in a further downstream market where customers of that customer compete (a so-called "third-line" injury). *See, e.g.*, F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 172-205 (1962); H. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1132-42 (1983).[2] This case involves alleged secondary-line injury. In *Morton Salt*, this Court set forth principles for establishing injury to competition in secondary-line cases. The Court held that where manufacturers "sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers," that fact alone "is sufficient to justify" a finding of the requisite "injury to competition." *See* 334 U.S. at 50-51. *Morton Salt* thus permitted two distinct inferences: first, that the existence of substantial price discrimination harms a disfavored customer; and second, that harm to an individual customer in turn harms competition in the relevant downstream market. Only the second of these inferences (referred to below as "the" *Morton Salt* inference) is at issue here.

2. Petitioner Osram Sylvania Products, Inc. manufactures various lighting products. Petitioner's competitors include large manufac-turers such as General Electric Company and Philips Corporation. Trial Transcript ("Tr.") 4039-40. Each of these manufacturers sells thousands of different lighting products to thousands of different distributors. Tr. 2953-54. Between 1987 and 1991, petitioner's lighting products accounted for only 36%

---

[2] By judicial extension, the Robinson-Patman Act covers even more remote downstream markets. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-48 (1969).

of all such sales, both nationwide and in Southern California. Trial Exhibit ("Exh.") 5123.

Although petitioner maintains a standard wholesale price list for its various products (Tr. 2549), it offers discounts in response to specific instances of competition. For example, petitioner sometimes lowers the price offered to an individual distributor in order to meet a competitor's offer to that distributor. Tr. 2575-78. Similarly, petitioner sometimes lowers the price offered to a distributor for sales to an individual consumer, in order to allow the distributor to meet a competing offer to that consumer. Tr. 2549-64. Between 1987 and 1991, in order to meet stiff competition from large competitors, petitioner offered increasingly steep discounts for an increasing percentage of its sales. Tr. 2970-78, 2994-95, 3001-02.[3]

Between 1987 and 1991, respondent Charles Von Der Ahe was a distributor of lighting products in Southern California, first through an individual proprietorship and then through a small corporation, respondent Chroma Lighting. Von Der Ahe entered the market as a 27-year-old with no relevant experience and with an initial investment of only $33,000. Tr. 241-44, 1256-60. His business never showed any profit. Tr. 1159-62. He voluntarily ceased operations in July 1991. Tr. 654.

During that time, the relevant distribution market was fiercely competitive. In Los Angeles and Orange Counties alone, there were over 200 established distributors. Tr. 4021, 1513. Petitioner alone sold to over 100 distributors, including respondents. Tr. 2537-38, 4045-56, Exh. 5124. Most distributors, including respondents, represented many manufacturers. Tr. 4055-58. The largest distributor possessed a market share of only 10%. Exh. 4669, at 141. There were 41 new entrants, which jointly accounted for 10% of petitioner's sales. Tr. 4075-79, Exh. 5127.

---

[3] During that time, the percentage of sales in which petitioner offered discounts increased from 45% to 75%. Tr. 2971-73.

3. After their business failed, respondents filed state tort claims against petitioner in a California trial court. Following removal to federal court on diversity grounds, respondents amended their complaint to add an antitrust claim for price discrimination.[4] Respondents alleged that petitioner had unlawfully given certain discounts to their competitors, and that their business had failed as a result. Pet. App. 4a. A jury found for respondents and returned a treble damages award of $3,525,000. *Id.*[5] Despite undisputed evidence of vigorous competition in the secondary-line market, the district court upheld the jury's finding of injury to competition, denied petitioner's motion for judgment as a matter of law, and entered judgment for respondents.[6]

4. The Ninth Circuit affirmed. As framed by that court, the sole question presented was "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." Pet. App. 4a. In addressing that question, the court reviewed at length the conflicting opinions of the District of Columbia Circuit in *Boise Cascade*, 837 F.2d at 1143-44, which had held that the *Morton Salt* inference of harm to competition was rebuttable, and the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), which had held, prior to this

---

[4] The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332(a)(1), and 1337(a).

[5] The award rested largely on testimony by respondent Von Der Ahe, whom the district court allowed to testify as a purported expert on antitrust damages. Mr. Von Der Ahe acknowledged that he had performed no "economic analysis" (Tr. 591), and the district court itself characterized his testimony as "a kind of mom and pop damages approach" (Tr. 587).

[6] In the district court, respondents also prevailed on two pendent state-law claims, neither of which is at issue here.

Court's decision in *Brooke Group*, that the inference of harm to competition was irrebuttable. Pet. App. 4a-5a.

Endorsing *Feeser* and rejecting *Boise Cascade*, the court of appeals held that "in a secondary-line Robinson Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." Pet. App. 13a. Relying heavily on legislative history, the court reasoned that "the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general." Pet. App. 5a. The Ninth Circuit acknowledged this Court's statement in *Brooke Group* that "by its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens competition." 509 U.S. at 209. However, the court held that statement completely inapplicable because *Brooke Group*, on its facts, involved an alleged primary-line injury in an upstream, wholesale market. Pet. App. 13a.[7]

REASONS FOR GRANTING THE WRIT

The nature of the *Morton Salt* inference raises fundamental questions, which will affect manufacturers, distributors and consumers, about the nature of the Robinson-Patman Act itself. If the *Morton Salt* inference were irrebuttable — if harm to an individu- al competitor conclusively established harm to "competition" regardless of actual market conditions — then the competitive injury requirement would be wholly illusory, and the

---

[7] The Ninth Circuit also declined to follow its own prior decision in *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984). In that case, which also involved an alleged secondary-line injury, a different Ninth Circuit panel had held that a "naked demonstration of injury to a specific competitor without more is not sufficient" to establish the competitive injury requirement. *Id.* at 548. Instead, the court held, "the test must always focus on injury to competition." *Id.* The court reasoned that "neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition." *Id.*

Robinson- Patman Act would (as the Ninth Circuit held) "protect individual competitors rather than competition in general." Pet. App. 5a. On the other hand, if the inference is rebuttable, then the competitive injury requirement retains significant vitality, and while secondary-line plaintiffs might be excused from addressing market conditions as part of a case-in-chief (*see* 334 U.S. at 50), at least defendants would be able to do so as part of a defense.

Over two decades ago, Chief Judge Posner explained that "the most critical issue" under the Robinson-Patman Act is "what is to be required in the way of proof of competitive injury." R. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 38-39 (1976). This case squarely presents that issue — a "much debated" question, H. Shniderman & B. Leverich, *Price Discrimination in Perspective* 46-47 (1987), on which the courts of appeals are now hopelessly divided. The Court should grant the petition for certiorari to resolve the circuit split and to address the foundationally important antitrust question presented.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION WHETHER A DEFENDANT MAY SEEK TO REBUT THE *MORTON SALT* INFERENCE OF HARM TO COMPETITION

As the Ninth Circuit acknowledged, "the circuits are divided" on the question presented here. Pet. App. 4a. At least four courts of appeals have held that injury to competition remains significant in secondary-line cases and, accordingly, that the *Morton Salt* inference may be rebutted. On the other hand, at least three courts of appeals have held that injury to individual competitors is paramount in secondary-line cases and, accordingly, that the *Morton Salt* inference is irrebuttable. As the Eleventh Circuit has noted, "[a] controversy has raged (and continues to rage) over the meaning of the word 'competition' as used in the so-called 'competitive injury' phrase of section 2(a)." *Alan's of Atlanta,*

Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).[8]

In *Boise Cascade*, the District of Columbia Circuit held that the *Morton Salt* inference of competitive injury is subject to rebuttal. In that case, the court of appeals set aside a Federal Trade Commission order concluding that a dealer had benefitted from price discrimination made unlawful by Section 2(a).[9] To overcome the *Morton Salt* inference, the dealer had introduced evidence that its industry was "characterized by intense competition" (837 F.2d at 1135) and that "competition among dealers generally was healthy" (*id.* at 1143). The FTC dismissed this evidence as irrelevant, but the court of appeals disagreed. The court explained that the *Morton Salt* inference could be "overcome by evidence showing an absence of competitive injury." *Id.* at 1144 (emphasis removed). The court reasoned that the Robinson-Patman Act "is directed to the preservation of competition" and that *Morton Salt* creates "only an inference" —

---

[8] Commentators repeatedly have noted this persistent judicial disagreement. *See, e.g.*, Wegenar, *9th Circuit Decision Invites High Court To Resolve Circuit Split on Rebuttability of Competitive Injury Inference Under Robinson-Patman Price Discrimination Act*, Nat'l L.J. (May 19, 1997) at B5-B6 (discussing this case); P. Larue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?*, 48 S.M.U. L. Rev. 1917, 1928 ("there is some confusion among the courts, and there is a conflict among the circuits"); F. Rowe, *supra*, at 126 (noting "perennial controversy over the correct application of Section 2(a) to avert detrimental effects on *competition*, on the one hand, or on individual *competitors*, on the other").

[9] The complaint in *Boise Cascade* arose under § 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(f), which makes it unlawful for a buyer to knowingly receive a price discrimination "prohibited by" § 2(a). *Boise Cascade* squarely presented the question of secondary-line injury under § 2(a), because "buyer liability under § 2(f) is dependent on seller liability under § 2(a)." *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 77 (1979).

and "manifestly does not create an irrebuttable presumption." *Id.* at 1143-44.

At least three other courts of appeals, in traditional secondary-line cases arising under § 2(a), have adopted similar holdings. In *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986), the Eighth Circuit affirmed a grant of summary judgment to the defendant on the ground that the plaintiff's market "was highly competitive" and "remained so" after the pricing decisions at issue. *Id.* at 420. The court stressed that the competitive injury requirement "refers not to the effect upon competitors, but to the effect upon competition in general." *Id.*[10] In *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985), the Tenth Circuit approved a jury instruction that "if a price discrimination is substantial in magnitude, you may presume such discrimination injured competition *unless you find [the defendant] has proved otherwise*." *Id.* at 394 (quotations omitted) (emphasis added). The court stressed that "'neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition.'" *Id.* at 394 (citation omitted). And in *Interstate Cigar Co., Inc. v. Sterling Drug, Inc.*, 655 F.2d 29 (2d Cir. 1981), the Second Circuit affirmed the dismissal of a claim where the plaintiff had failed to prove that the discount at issue "would tend to lessen competition substantially or to create a monopoly in any line of commerce, which is an essential condition precedent to establishing such a claim." *Id.* at 31.[11]

---

[10] The court further stated that "analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses." 799 F.2d at 420.

[11] The practice at issue in *Interstate Cigar Co.* involved a discount offered by a manufacturer to new distributors of its products. As the court of appeals explained, that pricing strategy, although "discrimination in price" within the meaning of § 2(a), "may well have increased competition" by inducing new market entrants. *See* 655 F.2d at 31.

On the other hand, at least two courts of appeals are aligned with the Ninth Circuit. In *Feeser*, the Third Circuit held that notwithstanding "undisputed" evidence of a "highly competitive" secondary-line market (909 F.2d at 1527), injury to an individual competitor conclusively satisfied the competitive injury requirement. *Id.* at 1535. The Court reasoned that although the Sherman Act "protects competition" only, the Robinson-Patman Act "extends its protection to competitors." *Id.* Similarly, in *Alan's of Atlanta*, the Eleventh Circuit held that "an injury to competition is proved by showing an injury to competitors." 903 F.2d at 1417 n.6. The court stressed that "the legal focus of the competitive injury inquiry is on the competitor, not the consumer." *Id.*

The courts of appeals are thus deeply divided on the question whether a defendant may overcome the *Morton Salt* inference by establishing the absence of any harm to competition. As discussed below in Section III, this division is particularly troubling because it affects wholesale pricing decisions in distribution channels that typically are regional or national in scope, and thus transcend the boundaries of the individual federal judicial circuits. Accordingly, the *same* pricing decisions are now *simultaneously* governed by radically different standards of Robinson-Patman Act liability. This Court should grant certiorari to resolve the circuit split that this case directly implicates.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *BROOKE GROUP* AND OTHER CASES

The Court also should grant certiorari because the Ninth Circuit's decision demonstrably conflicts with this Court's decisions in *Brooke Group* and in numerous other cases.

To begin with, the decision below is inconsistent with the plain terms of the Robinson-Patman Act itself and with this Court's decision in *Brooke Group*. The statute requires, as an essential element of any price discrimination claim, a showing of harm to competition. Specifically, the statute requires a showing that the price discrimination at issue may tend (i) "substantially to lessen

competition," (ii) "to create a *monopoly*," or (iii) "to injure, destroy, or prevent *competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (emphases added). In *Brooke Group*, this Court held that the statute means exactly what it says: "[b]y its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *See* 509 U.S. at 209.

The Ninth Circuit attempted to distinguish *Brooke Group* as a primary-line case. The text of the Robinson-Patman Act, however, simply cannot accommodate that distinction. *Each* of the three effects clauses covers *both* primary-line and secondary-line cases, *see* 15 U.S.C. § 13(a) (third clause); *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929) (first two clauses), so there is no harm to "competition" clause that can possibly mean harm to competition in the primary-line context, but only harm to competitors in the secondary-line context. Moreover, in *Brooke Group* itself, this Court relied primarily on its previous decisions in *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69 (1979), and *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). *See* 509 U.S. at 209. Those decisions each involved *buyer* liability for alleged *secondary*-line injuries. *See Great Atlantic & Pacific Tea Co.*, 440 U.S. at 74 ("Borden had discriminated in price between A&P *and its competitors*" (emphasis added)); *Automatic Canteen Co.*, 346 U.S. at 62 ("the buyer received lower prices on like goods than other buyers, 'well knowing that it was being favored *over competing purchasers*'" (emphasis added and citation omitted)).[12]

The Ninth Circuit decision also conflicts with *Morton Salt* and its progeny. In *Morton Salt* itself, this Court held only that

---

[12] As one commentator has stated, "[a]lthough the Court's statements regarding the Robinson-Patman Act's concerns with competition and consumer welfare were made in a primary line case, the statements would appear also to apply to the Act's secondary line coverage." P. Larue, *supra*, at 1923.

evidence of substantial price discrimination is "adequate to support" (334 U.S. at 47) or "sufficient to justify" (*id.* at 50) inferences of competitor and competitive injury. Nothing in that decision suggests that these inferences are irrebuttable. Indeed, subsequent decisions have clarified that the inferences are merely "established prima facie," *Falls City Indus., Inc. v. Vanco Beverage, Co.*, 460 U.S. 428, 435 (1983), and that competitive injury "may be inferred" from the predicate discrimination, *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990). Moreover, this Court has held explicitly that the first permissible inference — that substantial price discrimination injures the disfavored customer — "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City*, 460 U.S. at 435. If that inference "may be overcome" by specific evidence, then so too may the next inference permitted by *Morton Salt* — that injury to the downstream competitor causes injury to the secondary-line market. As the District of Columbia Circuit correctly recognized, "the import of *Morton Salt*" itself is that "the inference of injury is rebuttable." *Boise Cascade*, 837 F.2d at 1144.

The Ninth Circuit decision also conflicts with numerous decisions of this Court imposing the modest requirement that all of the antitrust laws be construed harmoniously. It is axiomatic that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 n.13; *see, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51, 458-59 (1978); *Automatic Canteen Co.*, 346 U.S. at 63, 73-74; *Standard Oil v. FTC*, 340 U.S. 231, 248-50 (1951). And it is also axiomatic that "the sole aim of antitrust legislation is to protect competition." *Gordon v. New York Stock Exchange*, 422 U.S. 659, 689 (1975); *see, e.g., Atlantic Richfield Co. v. USA Petroleum, Co.*, 495 U.S. 328, 338 (1990); *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962). By treating the Robinson-Patman Act as fundamentally different from all other antitrust statutes in its (supposed) orientation towards "individual competitors," Pet.

App. 5a, the Ninth Circuit decision also conflicts with these lines of cases.

Finally, the Ninth Circuit decision conflicts with the general principles governing the use of irrebuttable presumptions (also known as *per se* rules) in the antitrust context. To condemn a practice categorically, without consideration of actual market impacts, this Court requires that the practice almost invariably have a "pernicious effect on competition," unjustified by "*any* redeeming virtue." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958) (emphasis added). *Per se* rules are used only sparingly. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).[13] They are clearly inappropriate here, where the practice at issue is at worst competitively ambiguous. *See, e.g.*, P. Areeda & H. Hovenkamp, III *Antitrust Law* ¶ 721, at 217 (1996) ("Persistent price discrimination frequently, but not always, *increases* output.") (emphasis added).

Against all of this authority, the Ninth Circuit seized upon a few snippets of legislative history purportedly demonstrating that the Robinson-Patman Act sought to protect individual competitors as well as competition itself. Pet. App. 5a-9a. But the legislative history cannot support that conclusion. To begin with, while the bills originally introduced in 1935 by Senator Robinson (S. 3154) and by Representative Patman (H.R. 8442) would have eliminated the competitive injury requirement for price discrimination claims, the Congress expressly refused to enact those bills. Indeed, the House Judiciary Committee repeatedly expressed its concern that unless the price discrimination at issue imposed broad impacts on interstate commerce, federal regulation would

---

[13] We note that in *State Oil Co. v. Khan and Khan & Associates, Inc.*, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3567 (Feb. 18, 1997) (No. 96-871), this Court agreed to consider whether *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which held that vertical maximum resale price restraints are *per se* illegal, should be overruled.

be at least arguably unconstitutional. *See, e.g., Hearings Before the House Comm. on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 1st Sess. 144, 239 (1935). *See generally* F. Rowe, *supra*, at 12-14. Accordingly, while the Congress ultimately did enact an alternative effects clause for price discrimination claims, it explicitly retained — even in that clause — the traditional Clayton Act requirement of injury to "competition" (15 U.S.C. § 13(a)).

The pertinent legislative materials also reveal a dominant congressional concern with protecting the competitive process itself. For example, the Senate Judiciary Committee announced as its "guiding ideal":

> the preservation of *equal opportunity* to all usefully employed in the service of distribution 'comportably' with their ability and equipment to serve the producing and consuming public with *real efficiency*, and the preservation to that public of its freedom *from threat of monopoly or oppression* in obtaining its needs and disposing of its products.

S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936) (emphases added). The House Judiciary Committee stated emphatically that there was "nothing" in the Act "to penalize, shackle, or discourage efficiency, or to reward inefficiency . . . nor to limit the freedom of price movements in response to changing market conditions." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17. And Representative Patman himself stated that "[t]he bill has the support of those who believe that *competition* is the life of trade." 80 Cong. Rec. 3447 (1936) (emphasis added).[14] Thus, the

---

[14] *Accord, e.g., Hearings Before the House Comm. on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 1st Sess. 6 (1935) (Rep. Patman) ("If chains were to get control of this country we would have a monopoly and along with that monopoly would come higher prices."); 80 Cong. Rec. 6622 (1936) (Rep. Miller) ("[T]he Clayton Act was a step forward in the suppression of practices by which monopolies and restraints are promoted. . .The present bill is merely another step in the same direction.").

statutory text plainly requires an injury to competition, and large portions of the legislative history tend to confirm that requirement. Under these circumstances, the snippets of legislative history relied upon by the Ninth Circuit cannot possibly be controlling. *See, e.g., FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

III. THE NINTH CIRCUIT'S DECISION WILL BROADLY AFFECT MANUFACTURERS OF ELECTRICAL AND OTHER PRODUCTS AND IMPAIR COMPETITION

The electrical products manufacturing and distribution markets are highly competitive. As evidenced in this case, manufacturers sell thousands of lighting products to numerous distributors. In the geographic area at issue in this case, Los Angeles and Orange counties, there were over 200 established distributors. Given these market conditions, manufacturers naturally must engage in vigorous price competition.

The Ninth Circuit's refusal to allow manufacturers to defend against Robison-Patman Act claims on the ground that there is vigorous competition in the relevant market will have a widespread and serious impact on the electrical products industry. In electrical products and other competitive markets, fierce competition might itself now produce antitrust liability.

A. The Ninth Circuit's Decision Will Frustrate Important Antitrust Objectives

In *Automatic Canteen Company*, this Court recognized that an overly broad construction of the prohibition against price discrimination could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U.S. at 63. Similarly, in *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court warned that the courts "'must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up discouraging legitimate price

competition.'" *Id.* at 594 (citation omitted). That is exactly the situation here.

The Ninth Circuit decision severely constricts manufacturers' ability — even in competitive markets — to engage in legitimate price competition without fear of antitrust liability. For price discrimination claims, the decision below retains all of the draconian features of antitrust, including strict liability, treble damages and fee-shifting, but eliminates the bedrock limiting principle that these consequences are justified only where the conduct at issue harms or threatens not only an individual competitor, but also the competitive process itself. The decision thus imposes substantial unfairness on products manufacturers. Even worse, however, it also threatens competition.

Regardless of competitive conditions, manufacturers who respond flexibly to price competition (as did petitioner) now face the distinct possibility that their pricing decisions will create antitrust liability. Under *FTC v. Anheuser-Busch, Inc.*, 363 U.S. at 549, any "price difference" constitutes price discrimi- nation for purposes of the Robinson-Patman Act. And under the decision below, any (significant) price discrimination now creates an irrebuttable presumption of competitive injury. Moreover, although the Act does afford two defenses designed in theory to encourage competition, the applicability of those defenses — unlike a threshold determination whether the relevant market is competitive — is notoriously difficult to gauge accurately in advance. *See, e.g.*, P. Areeda, *Antitrust Analysis* 895 (2d ed. 1974) (cost-justification defense "is a mere illusion that traps the unwary"); Hansen, *supra*, at 1151 (meeting-competition defense "still leaves much discretion to the trier of fact"). Under these circumstances, manufacturers predictably will decline to engage in legitimate price competition, and the Robinson-Patman Act (as construed below) will affirmatively undercut the pro-competitive objectives of the various other antitrust statutes.

By contrast, the opposite rule would hardly impose onerous requirements on Robinson-Patman Act plaintiffs. Under *Boise Cascade* and comparable decisions, plaintiffs still retain the

benefit of the *Morton Salt* inference, and defendants can prevail only if *they* establish, through a traditional analysis of actual market conditions, that the specific price discrimination at issue would impose no injury to competition. Where defendants can make that showing, the absence of liability threatens none of the interests that the antitrust laws were designed to protect.

B. The Confusion Created By The Circuit Conflict Adversely Affects Competition

The conflict in the circuits, unless resolved, will itself have significant adverse effects. Manufacturers of electrical products typically operate in many jurisdictions at once. Many of their distribution programs are nationwide, and their distribution systems are becoming increasingly national in scope. The impact of the Robinson-Patman Act is felt not only when litigation is threatened or commenced, but during the sales process itself. Thus, distribution programs must be tailored to take into account prevailing interpretations of the Robinson-Patman Act.

The conflicting decisions on the issue presented in this case create a significant source of uncertainty for companies tailoring sales programs to comply with the antitrust laws. What may be permitted in the District of Columbia Circuit or the Eighth Circuit or the Tenth Circuit, would not be permitted in the Ninth Circuit or in the Third Circuit. Unless this conflict is resolved, manufacturers will have substantial difficulty in determining whether or not their sales programs and pricing decisions are in conformity with the Robinson-Patman Act.

At a minimum, manufacturers must tailor their sales practices to conform to the particular Circuit law in the area where sales occur. But even this approach may afford inadequate protection. Since many manufacturers do business all over the country, they may be subject to suit in many different jurisdictions simultaneously. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found." 15 U.S.C. §15(a). This language has been

interpreted to mean that a corporation can be "found" in any district where it carries on any substantial part of its business. *Thill Securities Corp. v. New York Stock Exchange*, 283 F. Supp. 239 (E.D. Wis. 1968); *see also American Football League v. National Football League*, 27 F.R.D. 264 (D. Md. 1961) ("found" generally means "doing business"). This exposure creates the possi- bility of forum shopping by disfavored buyers and may cause manufacturers to conform to the most anti-competitive interpretation of the Robinson-Patman Act, even if it is incorrect. The existing lack of uniformity, and the possibility of being targeted by disfavored buyers in various jurisdictions, thus work to make the industry less competitive.

This Court should grant the petition for certiorari to address the obviously important question presented, to resolve a steadily worsening circuit split, and to prevent the obvious anti-competitive effects of the Ninth Circuit's demonstrably erroneous judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
DALE R. SCHMIDT
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
1300 North 17th Street,
Suite 1847
Rosslyn, Virginia 22209
(703) 841-3280

TIMOTHY B. DYK
(Counsel of Record)
GREGORY G. KATSAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus Curiae National Electrical Manufacturers Association

Dated: September 19, 1997

Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

No. 97-307

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,
VS.
CHARLES T. VON DER AHE and
CHROMA LIGHTING,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER EHRMAN WHITE &
MCAULIFFE
333 Bush Street
San Francisco, California 94104
JAMES A. GAAS
JONATHAN A. STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01901
Attorneys for Petitioner

September 29, 1997

Rule 29.1 Listing

Petitioner refers to the Rule 29.1 listing in its Petition for Writ of Certiorari.

TABLE OF CONTENTS

Page

RULE 29.1 LISTING i

I. 1

II. 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Page

Alan's of Atlanta, Inc. v. Minolta Corp.,
903 F.2d 1414 (11th Cir. 1990) 2

Black Gold, Ltd. v. Rockwool Indus., Inc.,
729 F.2d 676 (10th Cir. 1984) 2

Boise Cascade Corp. v. FTC,
837 F.2d 1127 (D.C. Cir. 1988) 2, 3

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 2, 3, 5, 6

FTC v. Morton Salt,
334 U.S. 37 (1948) 3, 4

Foremost Pro Color, Inc. v. Eastman Kodak Co.,
703 F.2d 534 (9th Cir. 1983) 2

H.L. Hayden Co. of N.Y. v. Siemens Med. Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 2

J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,
909 F.2d 1524 (3d Cir. 1990) 2

Nash v. United States,
229 U.S. 373 (1913) 5

Richard Short Oil Co. v. Texaco, Inc.,
799 F.2d 415 (8th Cir. 1986) 2

United States v. Joint Traffic Ass'n.
171 U.S. 505 (1898) 5

I.

Respondent labors mightily to explain why the Ninth Circuit correctly held that the Robinson-Patman Act does not require proof of injury to competition in secondary-line cases. According to Respondent, the statute is not really an antitrust law at all, but a federalized unfair trade practices act in which Congress — sensibly or otherwise — made harm to particular traders, rather than harm to the competitive process or to consumer welfare, the touchstone of liability.

But those arguments respond to a different question than the one presented by the current petition. The question now is not whether the Ninth Circuit correctly resolved the issue of injury to competition in secondary-line Robinson-Patman cases, but simply whether that issue is a matter which commands the attention and resources of this Court.

That issue is not addressed by whether the Ninth Circuit "got it right" — linguistically, economically or as a matter of competition policy — but by whether the issue matters and whether this Court's consideration of it is necessary to set things straight. The answer to both those questions is "yes".

As Sylvania explained in its Petition, the distribution of goods of every type and in every corner of the country is affected by whether manufacturers may price their products in a welfare-maximizing fashion so long as doing so furthers, rather than harms, competition. The importance of resolving that question in a manner that is both uniform and definitive is, we believe, self-evident. Its importance is further underscored by the range of economic interests that have joined Sylvania as *amici curiae* in urging that *certiorari* be granted.

Equally clearly, only this Court can resolve the underlying legal question presented by this case. For all of Respondent's elaborate rhetoric about the clear language and purport of the statute, if this Court denies Sylvania's petition, the law will remain in an acknowledged state of uncertainty regarding which view of the Robinson-Patman Act is correct: that of the D.C. Circuit,[1] or that of the Third Circuit[2] and the Ninth Circuit in this case[3]. Moreover, only this Court can say whether its holding in *Brooke Group*[4] — that the very same statutory language which is at issue in this case requires proof of harm to *competition* — should, for some reason, be limited to primary-line cases.

The number of recent court of appeals opinions which have addressed the "injury to competition" question in secondary-line cases demonstrates the recurring and pervasive character of the issue. The diversity of views among, and within, those courts shows not only the difficulty of the issue but that the conflict is deeply enough imbedded that it will not be resolved short of consideration by this Court. What is more, we believe that this case presents an appropriate opportunity for the Court to consider

---

[1] Together with the Second, Eighth and Tenth. *See Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *H.L. Hayden Co of N.Y., v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984).

[2] And the Eleventh, see *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990), and *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

[3] Though not in *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983). *See* Pet. at 7 n.7.

[4] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

and resolve the issue which it left open in *Brooke Group* concerning the application of that decision to secondary-line cases.

II.

Respondent obviously — if reluctantly — recognizes that the issue here is not outcome, but suitability for review. Thus, he half-heartedly offers up three arguments for why review is unnecessary. None is persuasive.

First, Respondent says that there is not really a conflict at all. Opp. at 11-14. But if that is true, it certainly escaped notice by the Ninth Circuit. That court understood that it was being called upon to consider an issue that was left unresolved by this Court in *Morton Salt*[5] and to choose between the competing views of at least the D.C. and Third Circuits: "The question presented by Sylvania's appeal ... was left open by *Morton Salt*, and the circuits are divided on the issue." App. at 4a-5a. The Ninth Circuit further acknowledged the D.C. Circuit's conclusion that "the language of the Robinson-Patman Act ... indicates that Congress was concerned about the preservation of competition, and not the protection of competitors." App. at 6a (quoting *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1143 (D.C. Cir. 1988)). But, siding with the Third Circuit and Judge Mikva, it held that this language "expresses Congressional intent to protect individual competitors, not just market competition,

---

[5] *FTC v. Morton Salt*, 334 U.S. 37 (1948).

from the effects of price discrimination."[6] App. at 9a.

Second, Respondent insists that Sylvania's petition does not present an issue worthy of this Court's attention because he did not rely on the *Morton Salt* inference alone to establish that Sylvania's pricing practices damaged his business. Thus, he notes that, in addition to offering evidence that Sylvania extended substantial price discounts to his competitors, he presented evidence that he "lost sales and profits" as a result of Sylvania's pricing practices. That evidence, he insists, renders the issue framed by Sylvania's petition irrelevant. Opp. at 6-9.

But, again, the point does not remotely obviate the need for review. To be sure, as Respondent notes, the sufficiency of his proof of injury to his business is no longer a matter of dispute. Sylvania challenged his showing before the district court and the Ninth Circuit, arguing that he had failed to prove either a substantial price difference over time or lost sales and profits. In the end, the Ninth Circuit rejected Sylvania's arguments, finding his evidence of injury to his business sufficient. But, the finding that Sylvania's practices damaged Respondent's business simply sets the stage for the ultimate legal question: whether proof of injury to an individual

---

[6] This also disposes of what Respondent styles as an additional argument against consideration of this issue by the Court: that Sylvania has not identified an error in the lower courts because it was permitted to offer evidence that its pricing practices did not injure competition. Opp. at 14-18. Although the district court allowed Sylvania to introduce its evidence, the Ninth Circuit refused to consider it, holding that "the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition." App. at 13a.

competitor conclusively establishes the requisite injury to competition. That is the question Sylvania asks this Court to decide.

Third, Respondent says that Sylvania and its *amici* have come to the wrong place: that their explanations about economic inefficiency and the like should be addressed to Congress, rather than this Court. But the proper interpretation and application of statutes is quintessentially a judicial function. Moreover, it is a function that is a particular hallmark of antitrust enforcement. Our Nation's competition laws are written largely in the rhetoric of generalized policy goals, precatory exhortations to keep our economy operating freely. Indeed, this Court has noted that to interpret Section 1 of the Sherman Act literally would be to stop all commerce in its tracks,[7] and that the very constitutionality of the act is preserved from fatal uncertainty only through the edifying gloss of judicial interpretation.[8] Virtually every element of antitrust jurisprudence — including the *per se* rule, the rule of reason, the "pass-on" defense, the ebbing and flowing significance of efficiencies, and the pertinence of harm to competition rather than competitors — is a product of judicial interpretation. While the Robinson-Patman Act is modestly more detailed in its language, that fact did not, for example, obviate the Court's consideration of the interplay between harm to competition and competitors in *Brooke Group*.

Litigants disappointed with the provisions or application of a statute can, always, seek redress from the Legislature. But that is no substitute for obtaining

---

[7] *See, e.g., United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

[8] *See Nash v. United States*, 229 U.S. 373, 377 (1913).

definitive judicial guidance on the requirements of a particular enactment. The appropriateness of judicial review, in this case, is no less apparent than in *Brooke Group* or the innumerable other antitrust cases which have given shape to this country's competition policy. The abundance of conflicting opinions of the courts of appeals (and district courts) on the issue raised by Sylvania are testament not only to the legitimacy of judicial involvement but to its necessity. Congress — like Heaven — can wait.

CONCLUSION

For the foregoing reasons, the petition should be granted.

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER EHRMAN WHITE &
MCAULIFFE
333 Bush Street
San Francisco, California 94104

JAMES A. GAAS
JONATHAN A. STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01901

Attorneys for Petitioner